IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 30 1995

U.S. DISTRICT COURT

REROOF AMERICA, INC., FABTEC, INC., and HAROLD SIMPSON, INC.,

Plaintiffs,

v.

BUTLER MANUFACTURING COMPANY, and FLEMING BUILDING COMPANY, INCORPORATED,

Defendant.

Civil Action No. 94-C-724B

DATE 3 31 1995

STIPULATED ORDER OF DISMISSAL

Having reached a settlement of this action, pursuant to the Court's Settlement Conference Order, and having memorialized their settlement in a Settlement Agreement, dated effective as of February 7, 1995, the parties hereby stipulate and agree to the dismissal, with prejudice, of the above action. This Court accepts the Stipulation of the parties, through their respective counsel, and:

IT IS HEREBY ORDERED THAT:

1. This action is hereby dismissed with prejudice; and

2. The Court shall retain jurisdiction over the parties solely for the purpose of enforcing the Settlement Agreement between the parties relating to this Action.

DATED: Mar. 30th, 1995

UNITED STATES DISTRICT JUDGE

AGREED TO:

Laurence L. Pinkerton
Judith A. Finn
PINKERTON & ASSOCIATES
907 Philtower Building
Tulsa, Oklahoma 74103
(918) 587-1800

Attorneys for Plaintiffs

Scott B. Wood
Barkley, Rodolf & McCarthy
2700 Mid Continent Tower
Tulsa, Oklahoma 74103
(918) 587-1800

John J. Held
Richard T. McCaulley, Jr.
McANDREWS, HELD & MALLOY, LTD.
500 W. Madison, Suite 3400
Chicago, IL 60661
(312) 707-8889

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TERRY A. JENKINS,
RICHARD E. LOHMANN,
and LARRY B. KUNS,

Plaintiffs,

vs.

GREEN BAY PACKAGING, INC., ET AL.,

Defendants.

Case No. 91-C-639-B
(Consolidated)

AMENDMENT TO JUDGMENT

Upon remand from the United States Court of Appeals for the Tenth Circuit, this action is now before this Court for a determination of attorney fees to be awarded to plaintiffs Terry A. Jenkins ("Jenkins") and Larry B. Kuns ("Kuns"). Pursuant to the Order and Judgment entered by the Court of Appeals on November 7, 1994, summary judgment was granted in favor of Jenkins and Kuns for benefits under The Retirement Plan For Office And Salaried Employees Of Green Bay Packaging, Inc. And Subsidiaries ("Plan") accruing after March 1, 1987. The Court finds, and the parties have agreed, that a reasonable fee to be awarded Jenkins and Kuns is Twenty Five Thousand Dollars ($25,000.00) inclusive of all attorney fees, costs, expenses and interest. The Judgment rendered on August 20, 1992, is hereby amended as follows:

1. Judgment is hereby entered in favor of Jenkins in an amount equal to the benefit computed under Section V(1)(B) of the Plan with Jenkins' eligibility being for the period from January 1, 1987, through October 31, 1987. The method of payment shall be as provided in the Plan. Based on the best information currently available to the Plan Administrator and the current terms of the Plan, Jenkins' annual benefit commencing at normal retirement age of sixty

five (65) expressed in the form of a single life annuity would be One Thousand Four Hundred Seventy Two Dollars and Sixty Seven Cents ($1,472.67).

2. Judgment is hereby entered in favor of Kuns in an amount equal to the benefit computed under Section V(1)(B) of the Plan with Kuns' eligibility being for the period from January 1, 1987, through September 30, 1988. The method of payment shall be as provided in the Plan. Based on the best information currently available to the Plan Administrator and the current terms of the Plan, Kuns' annual benefit commencing at normal retirement age of sixty five (65) expressed in the form of a single life annuity would be One Thousand Six Hundred Twenty Nine Dollars and Eight Cents ($1,629.08).

3. Judgment is hereby entered in favor of Jenkins and Kuns for attorney fees, costs, expenses and interest in the amount of Twenty Five Thousand Dollars ($25,000.00).

In all other respects, the Judgment rendered on August 20, 1992, shall remain in full force and effect and binding upon the parties to this action.

Dated this 29th day of Mar., 1995.

THOMAS R. BRETT
United States District Judge

AGREED AND APPROVED:

George P. Phillips, OBA #7118
P. O. Box 4680
Tulsa, OK 74159
(918) 596-4890

-and-

David W. Mills, OBA #11678
P. O. Box 4680
Tulsa, OK 74159
(918) 585-8688

ATTORNEYS FOR TERRY A. JENKINS
AND LARRY B. KUNS

James L. Kincaid, OBA# 5021
Jeffrey T. Hills, OBA# 14743

- Of the Firm -

CROWE & DUNLEVY
A Professional Corporation
500 Kennedy Building
321 South Boston
Tulsa, OK 74103-3313
(918) 592-9800

ATTORNEYS FOR GREEN BAY
PACKAGING, INC.; GREEN BAY
PACKAGING, INC., AS SUCCESSOR
OF SOUTH WEST PACKAGING, INC.;
GREEN BAY PACKAGING, INC.,
AS ADMINISTRATOR FOR THE
RETIREMENT PLAN FOR OFFICE
AND SALARIED EMPLOYEES OF
GREEN BAY PACKAGING, INC.
AND SUBSIDIARIES; THE RETIREMENT
PLAN FOR OFFICE AND SALARIED
EMPLOYEES OF GREEN BAY PACKAGING,
INC. AND SUBSIDIARIES; AND R. P. LASTER

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

RADCO, INC.,

Plaintiff,

vs.

MAYHAN FABRICATORS, INC.,

Defendant,

and

LITWIN ENGINEERS & CONSTRUCTORS, INC.,

Interpleader in Intervention,

vs.

GLASS DESIGN, INC., an Oklahoma corporation, and CALLIDUS TECHNOLOGIES, INC.,

Defendants in Intervention.

Case No. 92-C-1034-E

ORDER OF DISMISSAL

This matter comes on for hearing on the joint Stipulation of Callidus Technologies, Inc. and Litwin Engineers & Constructors, Inc., for a dismissal with prejudice of the above captioned cause between said parties. The Court, being fully advised, having reviewed the Stipulation, finds that the above entitled cause should be dismissed with prejudice to the filing of a future action between said parties pursuant to said Stipulation.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the above entitled cause between Callidus Technologies, Inc. and Litwin Engineers &

Constructors, Inc., be and is hereby dismissed with prejudice to the filing of a future action between said parties, each party to bear their own respective costs.

Dated this 30 day of March, 1995.

S/ JAMES O. ELLISON

UNITED STATES DISTRICT COURT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

OKLAHOMA PLAZA INVESTORS, LTD.,

Plaintiff,

v.

WAL-MART STORES, INC.,

Defendant.

Case No. 94-C-0880-H

WAL-MART STORES, INC.,

Plaintiff,

v.

OKLAHOMA PLAZA INVESTORS, LTD.,

Defendant.

Case No. 94-C-1026-H

O R D E R

This matter comes before the Court on the motion to consolidate case number 94-C-0880 with case number 94-C-1026 by Plaintiff Oklahoma Plaza Investors, Ltd. ("OPI"), the motion to dismiss case number 94-C-0880 by Wal-Mart Stores, Inc. ("Wal-Mart"), the motion to stay case number 94-C-0880 by OPI, and the motions by OPI to transfer both cases to the United States Bankruptcy Court for the Northern District of Oklahoma.

OPI filed a bankruptcy action under Chapter 11 in the Northern District of Oklahoma in 1989. That action (Bk. No. 89-01236-C) is still pending. OPI has listed these actions as assets of the bankruptcy estate in its Plan of Reorganization and Third Amended Disclosure Statement. Amended Notice of Related Case and Request for Transfer at 3 n.3. Therefore, the Court concludes that it is

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proper that these actions be transferred to the Bankruptcy Court for disposition.

Accordingly,

(1) OPI's Motion to Consolidate (Dkt. #21), filed on January 4, 1995 in case number 94-C-0880-H, is hereby granted;

(2) OPI's Motion to Transfer (Dkt. #2), filed on September 22, 1994 in case number 94-C-0880-H, is hereby granted;

(3) Wal-Mart's Motion to Dismiss (Dkt. #9), filed on October 24, 1994 in case number 94-C-0880-H, is hereby denied;

(4) OPI's Motion to Stay Proceedings (Dkt. #15), filed on December 1, 1994 in case number 94-C-0880-H, is hereby denied;

(5) OPI's Motion to Transfer (Dkt. #6), filed on January 12, 1995 in case number 94-C-1026-H, is moot by virtue of the granting of OPI's Motion to Transfer in case number 94-C-0880-H; and

(6) the Clerk of the Court is duly directed to transfer these actions (by virtue of this order, now a single action consolidated under case number 94-C-0880-H) to the United States Bankruptcy Court for the Northern District of Oklahoma and to send the Bankruptcy Court a copy of this order.

IT IS SO ORDERED.

This 29th day of March, 1995.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CLYDE F. SHIELDS,

Plaintiff,

vs.

DONNA SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES,

Defendant.

Case No. 93-C-416-E

ORDER

Now before the Court is the appeal of the plaintiff Clyde Shields (Shields) to the Secretary's denial of disability benefits and supplemental security income.

Plaintiff filed Applications for Social Security Disability Benefits and for Supplemental Security Income Disability Benefits on June 11, 1991, which were denied. He exhausted his administrative remedies, and brought this action.

The Plaintiff was 44 years old at the time of the hearing, has an 11th grade education and received his GED. His past work is primarily as a truck driver, and he testified he had not worked since August 10, 1990. He also testified that he cannot work because of continuous pain caused by an operation for a collapsed lung, and that he is only able to lift 20 to 25 pounds, walk for 2 miles, stand for 15 to 20 minutes at a time, and sit for 10 minutes at a time. He also stated that he does minor house work such as cooking, vacuuming, and straightening, and that he is able to feed his animals. He sleeps for 4 to 5 hours a night and is able to operate a standard shift vehicle.

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He claims that the medical evidence supports his position that he is disabled, and reflects that he suffers from emphysema, has a 25% decreased capacity on the pulmonary function test, and has had part of his left lung removed. He claims the surgery to repair his lung caused permanent damage and severe pain. Plaintiff's treating physician, Dr. V. Thomas Smith, released him back to work on May 1, 1991, but noted "If after a trial employment, he is unable to perform his duties, then I have recommended that he seek a disability evaluation." Plaintiff also points out that Dr. Martin, who examined him at the request of his attorneys in October, 1991, found that he had limited range of motion in his right shoulder, muscle spasm and tenderness in his back, and tenderness in the right foot, which rendered him 100% impaired.

The administrative law judge found that Plaintiff had no disabling complaints except his chest pain. He adopted the opinion and residual functional evaluation of Plaintiff's treating physician, Dr. Smith. Dr. Smith found that Plaintiff could sit for up 8 hours, stand for up to 6 hours, and walk for up to 5 hours at a time, all without the need to rest or change position. He found that Plaintiff could lift and carry up to 100 pounds infrequently, 50 pounds occasionally, 20 pounds frequently, and 10 pounds continuously. The ALJ rejected the opinion of Dr. Martin, in favor of that of Dr. Smith, and noted that the standards for impairment under workers' compensation and for disability under social security were different. He found, based on Dr. Smith's notes, that Plaintiff could perform medium work, that he did not lead the

life of a person suffering disabling pain, and that he could return to his past work as a truck driver or janitor.[1]

Legal Analysis

The Secretary must follow a five-step process in evaluating a claim for disability benefits. 20 C.F.R. §416.920 (1988). If a person is found to be disabled or not disabled at any point, the review ends. §416.920(a). The five steps are as follows:

1. A person who is working is not disabled. 20 C.F.R. §416.920(b)

2 A person who does not have an impairment or combination of impairments severe enough to limit the ability to do basic work is not disabled. 20 C.F.R. §416.920(c).

3. A person whose impairments meets or equals one of the impairments listed in the regulations is conclusively presumed to be disabled. 20 C.F.R. §416.920(d).

4. A person who is able to perform work he has done in the past is not disabled. 20 C.F.R. §416.920(e).

5. A person whose impairment precludes performance of past work is disabled unless the Secretary demonstrates that the person can perform other work. Factors to be considered are age, education, past work experience, and residual functional capacity. 20 C.F.R. §416.920(f).

Reyes V. Bowen, 845 F.2d 242, 243 (10th Cir. 1988).

The claimant bears the burden of establishing a disability, i.e., the first four steps. Thompson v. Sullivan, 987 F.2d 1482, 1487 (10th Cir. 1993). Williams v. Bowen, 844 F.2d 748, 751 n.2 (10th Cir. 1988). Once step five is reached, the burden shifts to the Secretary to show that claimant retains the capacity to perform

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[1] At the hearing, Plaintiff's counsel pointed out that Plaintiff had no past relevant work as a janitor, and that the "janitorial work" performed by Plaintiff is really part of his work as a truck driver.

alternative work types which exist within the national economy. Diaz v. Secretary of Health & Human Servs., 898 F.2d 774, 776 (10th Cir. 1990).

The Secretary's decision and findings will be upheld if supported by substantial evidence. Nieto v. Heckler, 750 F.2d 59, 61 (10th Cir. 1984). Substantial evidence is evidence a reasonable mind would accept as adequate to support a conclusion Andrade v. Sec'y Health & Human Services, 985 F.2d 1045, 1047 (10th Cir. 1993). A decision is not based on substantial evidence if it is overwhelmed by other evidence in the record of if there is a mere scintilla of evidence supporting it. Ellison v. Sullivan, 929 F.2d 534 (10th Cir. 1990) (evidence not substantial if overwhelmed by other evidence or merely a conclusion); Bernal v. Bowen, 851 F.2d at 299; Williams v. Bowen, 844 F.2d 748, 750 (10th Cir. 1988) (same). The inquiry is not whether there was evidence which would have supported a different result but whether there was substantial evidence in support of the result reached. In addition, the agency decision is subject to reversal if the incorrect legal standard was applied. Henrie v. U.S. Dep't Health and Human Services, 13 F.3d 359, 360 (10th Cir. 1993); Williams v. Bowen, 844 F.2d at 750.

This case was decided by the ALJ at the fourth sequential step, and thus the burden was on Shields to demonstrate that the he was disabled because he could not perform his past relevant work. Plaintiff claims, however, that the ALJ erred in failing to properly evaluate his complaints of pain, in failing to consider his impairments in combination, and in relying on the Grids without

calling a vocational expert. The Secretary argues that Plaintiff's first argument merely amounts to a request to this court to reweigh the evidence and make its own credibility determination, which it cannot do. She asserts that the credibility determination made by the ALJ is in accordance with Luna v. Bowen, and must be given considerable deference. The Secretary also argues that the ALJ did consider the combined effect of Plaintiff's impairments, and that the argument with respect to a vocational expert and the grids is irrelevant since this case was decided at the fourth and not the fifth sequential step.

Plaintiff essentially argues that he did meet his burden of proving disability at the fourth step. However, the Court finds that the ALJ correctly relied on the opinion of the treating physician and rejected the opinion of the Dr. Martin. See Frey v. Bowen, 816 F.2d 508, 513 (10th Cir 1987). Moreover Plaintiff's own testimony and the medical records from Dr. Smith constitute substantial evidence to support the opinion of the ALJ. His conclusion that Plaintiff can return to his past occupation of truck driving is supported by the assessment of Dr. Smith of Plaintiff's capabilities, Plaintiff's own testimony that he could drive a standard shift truck, and Plaintiff's testimony regarding his activities. While Dr. Smith did not specifically find that Plaintiff could return to truck driving, he found that Plaintiff could sit for eight hours, move without limitation, and do some lifting. Additionally, the ALJ properly analyzed Plaintiff's complaints of pain and concluded that pain did not prevent him from

doing his past work.

Plaintiff's appeal is denied.

IT IS SO ORDERED THIS 29nd DAY OF MARCH, 1995.

JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

INTER CHEM COAL COMPANY, a wholly owned subsidiary of INTERNATIONAL CHEMICAL COMPANY INC., an Oklahoma corporation,

Plaintiff,

vs.

W.K. JENKINS, a Missouri resident

Defendant.

No. 94-C-280-K

O R D E R

Before the Court is the motion of the plaintiff for attorney fees. Plaintiff sued defendant as surety on a performance bond executed for the benefit of the plaintiff. On December 8, 1992, plaintiff entered into a contract with Industrial Management Services (IMS) whereby IMS would conduct surface mining and reclamation operations on a coal lease held by the plaintiff. A performance bond, to insure timely performance with all reclamation responsibility, was executed on the same day in the amount of $150,000, with IMS as principal and defendant as surety. IMS defaulted on the agreement, and plaintiff proceeded against defendant on the bond. This court granted summary judgment in favor of the plaintiff by Order entered February 7, 1995, and plaintiff now moves for an award of attorney fees incurred in this action.

Local Rule 54.2 states in part:

> A. Any party entitled to and requesting attorney fees shall file within fourteen (14) days of the entry of judgment a motion for

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such....
B. Any party failing to comply with this rule will be deemed to have waived the claim or any objection.

Because plaintiff filed its motion on March 8, 1995, twenty-nine days after judgment was entered, plaintiff failed to comply with the 14 day deadline required by the local rule, thus waiving its claim for attorney fees.

It is the Order of the Court that the motion of the plaintiff for attorney fees is hereby **DENIED.**

ORDERED this 28 day of March, 1995.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DANIEL H. FOX and DEBORAH K. FOX, Husband and Wife, Individually and as Natural Parents of MICHAEL K. FOX, a Minor, deceased,

Plaintiff,

vs.

CITY OF SAND SPRINGS, OKLAHOMA, a Municipal Corporation; TOM LEWALLEN, Individually, and as Chief of Police of Sand Springs, Oklahoma; and RICHARD ALLEN SAPCUT,

Defendants.

No. 94-C-744-K

O R D E R

Before the Court is defendant Richard Allen Sapcut's Motion to Dismiss for Plaintiffs' failure to serve him within 120 days of the filing of the Complaint as required by Rule 4(m) of the Federal Rules of Civil Procedure.

Defendant Sapcut, in his Motion to Dismiss, states that the instant lawsuit was filed on August 1, 1994, that Defendant Sapcut was not served with Summons until January 2, 1995, and that Plaintiffs have not shown or asserted good cause for such failure to serve Defendant Sapcut within the statutory 120 day requirement. Therefore, Defendant Sapcut argues he should be dismissed from the lawsuit.

Plaintiffs object, asking the Court to deny Defendant's Motion to Dismiss, to extend the time for service, and to find personal

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service on Defendant Sapcut already made proper under Rule 4(m).

Rule 4(m) states in part:

> If service of summons and complaint is not made upon the defendant within 120 days after the filing of the complaint, the court upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specific time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period.

Plaintiffs sent notice of the lawsuit on October 4, 1994 to Richard Allen Sapcut, by certified mail, restricted delivery, to City of Sand Springs, P.O. Box 338, Sand Springs, OK 74063. This return receipt was signed on October 12, 1994 by "W. Parrish." Citing Rule 4(d), Plaintiffs argue Defendant Sapcut had until November 7, 1994, to return the Waiver of Service. When this Waiver was not returned, Plaintiffs attempted to locate Defendant Sapcut, whom Plaintiffs learned had moved out of state and upon whom personal service was perfected on January 2, 1995. Accordingly, Plaintiffs contend they have shown good cause for the Court to extend the time period, deem the service of Defendant as timely and deny Defendant's Motion.

Defendant Sapcut submits that Plaintiffs have not shown the requisite "good cause," that Plaintiffs' counsel waited more than two months before mailing the suit papers, and that Plaintiffs' counsel waited more than three months before inquiring about the whereabouts of Defendant Sapcut. Defendant cites Cox v. Sandia Corporation, 941 F.2d 1124 (10th Cir. 1991) and Putnam v. Morris,

833 F.2d 903 (10th Cir. 1987), two cases decided under Rule 4(j), the predecessor to the present Rule 4(m). Rule 4(j) was less lenient to plaintiffs, requiring a dismissal absent a showing of good cause for delayed service.

By contrast, Rule 4(m) has recently been interpreted as follows:

> We hold that as a result of the rule change which led to Rule 4(m), when entertaining a motion to extend time for service, the district court must proceed in the following manner. First, the district court should determine whether good cause exists for an extension of time. If good cause is present, the district court must extend time for service and the inquiry is ended. If, however, good cause does not exist, the court may in its discretion decide whether to dismiss the case without prejudice or extend time for service.

Petrucelli v. Bohringer and Ratzinger, _____ F.3d _____, 1995 WL 36526 (3rd Cir.1995). This interpretation also finds support in the Advisory Committee notes to Rule 4. ("The new subdivision. . . authorizes the court to relieve a plaintiff of the consequences of an application of this subdivision even if there is no good cause shown").

Upon review, the Court concludes plaintiffs have not demonstrated good cause for their failure to effect service within 120 days of the filing of the complaint. One commentator has warned of precisely this situation: "The lesson is that a plaintiff using the waiver procedure must not dally. Plaintiffs who wait a month or two before using it, and another month or so waiting for it to come back, only then turning to another method

when the waiver doesn't materialize, may find themselves out of time under Rule 4(m)." Siegel, Practice Commentaries on FRCP 4, reprinted in 28 U.S.C.A. Rule 4 (1994 Cum.Ann.Pocket Part) at 97.

However, the Court must still exercise its discretion to determine whether an extension should nonetheless be granted. The Court does not view such discretion as unfettered. The two most obvious considerations are length of delay and prejudice to the defendant. Here, the service upon defendant Sapcut was effected roughly five months after the filing of the complaint, or roughly 30 days beyond the 120 day limit. The Court sees nothing in the record to indicate defendant Sapcut will be prejudiced by permitting the present case to proceed, as opposed to forcing plaintiff to refile or attempt renewed service. The litigation is in its infancy, as reflected by the fact a case management conference has not yet been held. The Court deems it appropriate to hold the late service valid under Rule 4(m) on this occasion. Plaintiffs' counsel is advised to exercise due diligence in the future.

It is the order of the Court that the motion of Defendant Sapcut to dismiss is hereby DENIED.

ORDERED this 29 day of March, 1995.

Terry C. Kern

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

FEDERAL DEPOSIT INSURANCE CORPORATION, in its corporate capacity, as successor in Interest to Miami National Bank, Miami, Oklahoma,

Plaintiff,

v.

David A. Robinson, et al.

Defendants.

No. 91-C-691-B

ORDER OF DISMISSAL WITHOUT PREJUDICE

This cause comes on for hearing this 27 day of Mar., 1995, pursuant to the Application for Dismissal Without Prejudice, filed herein by the Plaintiff, FDIC; for good cause shown, and this Court being advised in the premises, the Court determines that such Application should be and therefore is granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the above-captioned case is dismissed without prejudice to the filing of a future action.

UNITED STATES DISTRICT JUDGE

APPROVED:

R. Pope Van Cleef, Jr./OBA 9176
Attorney for Federal Deposit Insurance Corporation

ROBERTSON & WILLIAMS
6108 North Western Avenue
Oklahoma City, OK 73118
Telephone: (405) 848-1944

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LIBERTY MUTUAL INSURANCE GROUP,

Plaintiff,

vs.

EAST CENTRAL OKLAHOMA ELECTRIC COOPERATIVE, and STONEWALL SURPLUS LINES INSURANCE COMPANY,

Defendants.

No. 93-C-1007-K

JUDGMENT

This matter came before the Court for consideration of the plaintiff's motion for summary judgment. The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for the plaintiff and against the defendant East Central Oklahoma Electric Cooperative. Defendant is not entitled to coverage under either the Comprehensive General Liability Policy or the Business Automobile Policy which insured Creek County Well Service on February 24, 1986.

ORDERED this 28 day of March, 1995.

Terry C. Kern

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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ENTERED ON DOCKET

DATE MAR 29 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LIBERTY MUTUAL INSURANCE GROUP,

Plaintiff,

vs.

EAST CENTRAL OKLAHOMA ELECTRIC COOPERATIVE, and STONEWALL SURPLUS LINES INSURANCE COMPANY,

Defendants.

No. 93-C-1007-K

FILED

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Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

O R D E R

The Court has for consideration cross-motions for summary judgment (Docket #11, #16) in this declaratory judgment action. Plaintiff is Liberty Mutual Insurance Group, which is the insurer of Creek County Well Service ("CCWS"), a non-party to this litigation. East Central Oklahoma Electric Cooperative ("EC") is the remaining defendant.[1] The parties have agreed to submit the matter on briefs.

I. Statement of the Case

On February 24, 1986, three employees of CCWS were injured when the oil well servicing rig which they were operating came into contact with high voltage electrical lines, owned and operated by Defendant EC. At the time of the accident, CCWS held policies of insurance with Liberty Mutual and Stonewall Surplus. The CCWS employees and their families brought separate actions in the

[1]Stonewall Surplus Lines Insurance Company was dismissed as a defendant by Order of the Honorable Thomas R. Brett entered February 8, 1994.

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District Court of Creek County, Oklahoma, against EC, which, in turn, filed a third-party petition against CCWS, seeking indemnity. CCWS filed Chapter 11 bankruptcy in January, 1988.

After a personal injury judgment was entered against EC in Creek County District Court, EC proceeded with its indemnity claims against CCWS in bankruptcy court. The bankruptcy reference was withdrawn and jury trial was conducted in the United States District Court for the Northern District of Oklahoma (93-C-819-E). EC was awarded a judgment against CCWS, determining CCWS was liable for 75% of the personal injury judgment against EC rendered in the Creek County District Court. An appeal from the verdict is presently pending before the United States Court of Appeals for the Tenth Circuit.

Plaintiff Liberty insures CCWS, providing Workers' Compensation and Employers Liability Policy, No. WC2-191-063299-016, and has paid $500,000 in policy limits under this policy. Defendant Stonewall Surplus provided excess coverage under policy, No. 58003345, issued to CCWS, and has tendered its policy limits of $1,000,000 to EC. Defendant EC asserts it is entitled to the liability limits of two additional Liberty Mutual policies, a Comprehensive General Liability Policy, ("CGL"), No. LG1-191-063299-026, and a Business Automobile Policy, ("BA"), No. AS1-191-063299-036, both of which are issued to CCWS. Liberty Mutual contends such payments are excluded by the terms of these two policies.

Consequently, in this declaratory judgment action plaintiff

Liberty Mutual seeks a determination as to whether this particular loss was covered within the terms of the CGL and BA insurance policies. EC contends coverage is provided by the CGL and BA insurance policies issued by Plaintiff Liberty. Liberty Mutual asserts that policy exclusions bar indemnity recovery by EC. Former defendant Stonewall Surplus Lines suggested that its coverage does not take effect until Liberty Mutual has paid the $2,500,000 in insurance coverage which EC claims it is due. Therefore, Liberty Mutual seeks a declaratory judgment that the only insurance policy issued by Liberty Mutual to CCWS which covers EC's loss is the Employers Liability Policy with limits of $500,000 previously paid to CCWS.

II. Standard of Fed.R.Civ.P. 56 Summary Judgment

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Windon Third Oil & Gas v. FDIC*, 805 F.2d 342 (10th Cir. 1986). In *Celotex*, the court stated:

> The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 317 (1986). To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material

facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita v. Zenith*, 475 U.S. 574, 585 (1986). The evidence and inferences therefrom must be viewed in a light most favorable to the nonmoving party. *Conaway v. Smith*, 853 F.2d 789, 792 n. 4 (10th Cir. 1988).

A recent Tenth Circuit Court of Appeals decision in *Committee for the First Amendment v. Campbell*, 962 F.2d 1517 (10th Cir. 1992), concerning summary judgment states:

> Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." . . . Factual disputes about immaterial matters are irrelevant to a summary judgment determination . . . We view the evidence in a light most favorable to the nonmovant; however, it is not enough that the nonmovant's evidence be "merely colorable" or anything short of "significantly probative."
>
> * * *
>
> A movant is not required to provide evidence negating an opponent's claim . . . [r]ather, the burden is on the nonmovant, who "must present affirmative evidence in order to defeat a properly supported motion for summary judgment." . . . After the nonmovant has had a full opportunity to conduct discovery, this burden falls on the nonmovant even though the evidence probably is in possession of the movant. (Citations omitted.)

Id. at 1521.

III. Discussion

According to Defendant EC, CCWS was guilty of violating the "six foot rule" codified in 63 O.S. §§ 981-987. EC claims these statutes provide for indemnification from CCWS for the personal injury judgment rendered against EC in the District Court of Creek

County.[2] EC cites Travelers Insurance Company v. L.V. French Truck Service, Inc., 770 P.2d 551 (Okla.1988), in which the Oklahoma Supreme Court defined this right of recovery to include any loss sustained by the utility. The specific holding in Travelers was that the "exclusivity" provision of 85 O.S. §12 dealing with workers' compensation did not immunize an employer from liability for violating the "six-foot rule". In the case at bar, by contrast, we deal with the employer as insured and the written terms of an insurance policy.

An insurance policy is a contract. If the terms are unambiguous, clear and consistent, they are to be accepted in their ordinary sense and enforced to carry out the expressed intention of the parties. Whether an insurance contract is ambiguous is a matter for the court to determine as a matter of law. Parties to an insurance contract are at liberty to contract for insurance to cover such risks as they see fit and are bound by the terms of the contract and courts will not undertake to rewrite the terms thereof. Phillips v. Estate of Greenfield, 859 P.2d 1101, 1104 (Okla.1993). EC was not a party to the making of these insurance contracts.

Plaintiff contends the exclusions in the Comprehensive General

---

[2]Section 981 prohibits any person, firm, corporation or association from performing or permitting activity during which a person or employee may be placed within six feet of any high voltage overhead electrical line. Section 984 provides that any employer who violates this provision shall be liable to the owner or operator of the high voltage line "for all liability incurred by such owner or operator as a result of any such accidental contact." East Central Elec. Co-op. v. Robert Gordon Equip., 772 F.2d 662, 663 (10th Cir.1985).

Liability policy and the Business Auto policy are unambiguous and apply to the loss. Turning first to the Comprehensive General Liability policy, under Coverage A, the relevant provision and exclusions state as follows:

> Comprehensive General Liability Policy:
> Part I - Coverage A -- Bodily Injury Liability
>
> > The company will pay on behalf of the **insured** all sums which the **insured** shall become legally obligated to pay as damages because of Coverage A. **bodily injury**...
> > to which this policy applies, caused by an **occurrence**, and the company shall have the right and duty to defend any suit against the **insured** seeking damages on account of such **bodily injury** ..., even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient, but the company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the company's liability has been exhausted by payment of judgments or settlements.
>
> **Exclusions**
> This policy does not apply: ...
> (i) to any obligation for which the **insured** or any carrier as his insurer may be held liable under any workmen's compensation, unemployment compensation or disability benefits law, or under any similar law;
>
> (j) to **bodily injury** to any employee of the **insured** arising out of and in the course of his employment by the **insured** or to any obligation of the **insured** to **indemnify** another because of damages arising out of such injury; but this exclusion does not apply to liability assumed by the **insured** under an **incidental contract**;

Liability policy and the Business Auto policy are unambiguous and apply to the loss. Turning first to the Comprehensive General Liability policy, under Coverage A, the relevant provision and exclusions state as follows:

> Comprehensive General Liability Policy:
> Part I - Coverage A -- Bodily Injury Liability
>
> The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of Coverage A. bodily injury... to which this policy applies, caused by an occurrence, and the company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury ..., even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient, but the company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the company's liability has been exhausted by payment of judgments or settlements.
>
> **Exclusions**
> This policy does not apply: ...
> (i) to any obligation for which the insured or any carrier as his insurer may be held liable under any workmen's compensation, unemployment compensation or disability benefits law, or under any similar law;
>
> (j) to bodily injury to any employee of the insured arising out of and in the course of his employment by the insured or to any obligation of the insured to indemnify another because of damages arising out of such injury; but this exclusion does not apply to liability assumed by the insured under an incidental contract;

Citing the authority of National Union Fire Insurance Co. v. Kasler

Corp., 906 F.2d 196 (5th Cir. 1990), plaintiff correctly states the identical exclusionary clauses as those found in (i) and (j) of the Liberty comprehensive general liability policy were applied by that court to exclude coverage for an indemnity claim brought by a public utility.

The amendatory endorsement labeled GL 00 32 states as follows:

> It is agreed that the exclusion relating to **bodily injury** to any employee of **the insured** is deleted and replaced by the following:
> This insurance does not apply:
> (i) to **bodily injury** to any employee of **the insured** arising out of and in the course of employment by the **insured** with the **insured** may be held liable as an employer or in any other capacity;
> (ii) to any obligation of the **insured** to indemnify or contribute with another because of damages arising out of the bodily injury

If anything, the amendatory endorsement makes more explicit indemnification claims are not covered under the comprehensive general liability policy. To the same effect as Kasler on the point is Pearson Enterprises, Inc. v. INA Ins. Co., 937 F.2d 401 (8th Cir.1991).

Conversely, the cases cited by defendant EC involve the same, or similar language, or the same version of the standard form of CGL policy. Keeping with this Circuit's pronouncements in Hartford Accident & Indemnity v. Pacific Mut. Life Ins., 861 F.2d 250 (10th Cir. 1988) and those of the Oklahoma Supreme Court in U.S. Fidelity & Guaranty Co. v. Walker, 329 P.2d 852 (Okla. 1958), this Court does not consider a case construing poli

coverag authoritative unless the [illegible] involves the same language
or s[illegible] version of [illegible] standard form under consideration. The
C[illegible] finds the policies [illegible]ion unambiguous and the exclusions
applicable.

The Bu[illegible]s Auto Policy provides [illegible]pertinent part:

Part IV - Li[illegible]rance,

A. We [illegible] pay

We wi[illegible] all [illegible] the **insured**
legall[illegible] pay as [illegible]hich this
bodily [illegible]ury ... [illegible] by an
[illegible]ance [illegible]lies, cau[illegible] from the
an[illegible] resulting
mai[illegible]nance or use of a
[illegible] to.

cov[illegible] right and [illegible]ty to defend
We hav[illegible] aking for the [illegible] damages.
[illegible] have [illegible]ty to defend
suit[illegible] **bodily** [illegible]y ... not
this poi[illegible]. **We** may
cover[illegible] and settle [illegible]ny claim or
invest[illegible] ppropriate.
suit as [illegible] LIABILITY
Our payment [illegible]ty to
INSURANCE limit
defend or settle.

[illegible] - Excl[illegible]s
[illegible] to:

Corp., 906 F.2d 196 (5th Cir. 1990), plaintiff correctly states the identical exclusionary clauses as those found in (i) and (j) of the Liberty comprehensive general liability policy were applied by that court to exclude coverage for an indemnity claim brought by a public utility.

The amendatory endorsement labeled GL 00 32 states as follows:

> It is agreed that the exclusion relating to **bodily injury** to any employee of the **insured** is deleted and replaced by the following:
> This insurance does not apply:
> (i) to **bodily injury** to any employee of the **insured** arising out of and in the course of his employment by the **insured** for which the **insured** may be held liable as an employer or in any other capacity;
> (ii) to any obligation of the **insured** to indemnify or contribute with another because of damages arising out of the bodily injury;

If anything, the amendatory endorsement makes more explicit indemnification claims are not covered under the comprehensive general liability policy. To the same effect as Kasler on the point is Pearson Services, Inc. v. INA Ins. Co., 937 F.2d 401 (8th Cir.1991).

Conversely, none of the cases cited by defendant EC involve the same, or similar, language, or the same version of the standard form of CGL policy. In keeping with this Circuit's pronouncements in Hartford Accident & Indemnity v. Pacific Mut. Life Ins., 861 F.2d 250 (10th Cir. 1988) and those of the Oklahoma Supreme Court in U.S. Fidelity & Guaranty Co. v. Walker, 329 P.2d 852 (Okla. 1958), this Court does not consider a case construing policy

coverage authoritative unless the case involves the same language or same version of the standard form under consideration. The Court finds the policies in question unambiguous and the exclusions applicable.

The Business Auto Policy provides in pertinent part:

Part IV - Liability Insurance,

A. **We Will Pay**

1. **We** will pay all sums the **insured** legally must pay as damages because of **bodily injury** ... to which this insurance applies, caused by an **accident** and resulting from the ownership, maintenance or use of a covered **auto.**

2. **We** have the right and duty to defend any suit asking for these damages. However, **we** have no duty to defend suits for **bodily injury** ... not covered by this policy. **We** may investigate and settle any claim or suit as **we** consider appropriate. **Our** payment of the LIABILITY INSURANCE limit ends **our** duty to defend or settle.

C. **We Will Not Cover - Exclusions**
This insurance does not apply to:

1. Liability assumed under any contract or agreement.

2. Any obligation for which the **insured** or his or her insurer may be held liable under any workers' compensation or disability benefits law or under any similar law.

3. Any obligation of the **insured** to

indemnify another for damages resulting from **bodily injury** to the **insured's** employee.

4. **Bodily injury** to any fellow employee of the **insured** arising out of and in the course of **his** or her employment.

5. **Bodily injury** to any employee of the **insured** arising out of and in the course of his or her employment by the **insured.** However, this exclusion does not apply to **bodily injury** to domestic employees not entitled to workers' compensation benefits.

In reviewing the Business Auto Policy, the Court notes that at pages 2-3 appears substantially the identical exclusionary clause as is contained in the CGL. For the same reasons stated above, the Court finds that the claims for indemnity by EC against Liberty are excluded by the unambiguous terms and conditions of the Business Automobile policy. Although both defendant and plaintiff explain in detail the definition of **insured auto** and **mobile equipment**, it is this Court's opinion that the exclusionary language referenced above resolves the issues between the parties as to the Business Auto policy as well. EC argues the exclusions are inapplicable because its claim is a statutory one for "all losses incurred" and not a claim for bodily injury. EC has not explained how it is therefore entitled to recover the policy limits, already paid, pursuant to the Employers Liability policy, which refers to damages claimed against a third party as a result of injury to the insured's employee. EC appears to be taking a contradictory position in order to recover under the other two policies at issue in this action.

IV. Conclusion

In the present case, the key to liability, even if founded solely under the "six foot rule" statute, is that CCWS was responsible for the acts of its employees. Without liability as the employer of the three men, CCWS has no liability to EC. In this case, the employees of CCWS were injured during the course of their employment. The third-party claim prosecuted by EC is designed to secure indemnification from CCWS for any liability arising out of the employees' work-related injury. The facts of this case fall squarely within the exclusionary language of clause (j) of the comprehensive general liability policy and exclusion 5 of the Business Automobile Policy. Accordingly, the two policies under review do not provide coverage for the claims in question.

It is the Order of the Court that the Plaintiff's Motion for Summary Judgment is GRANTED, and the summary judgment motion of Defendant is DENIED.

ORDERED this 28 day of March, 1995.

Terry C Kern

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

VALERIE ANDERSON, Individually,

Plaintiff,

vs.

EZPAWN OKIE, INC., an Oklahoma corporation; and EZPAWN, a Texas corporation,

Defendants.

Case No. 94-CV-665-H

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

COMES NOW the Plaintiff, Valerie Anderson, and the Defendants, EZPawn Oklahoma, Inc. a/k/a EZPawn Okie, Inc., and EZCorp, a/k/a EZPawn, and, pursuant to Rule 41(a)(1) of the Fed.R.Civ.P., jointly stipulate to a dismissal with prejudice of the above styled cause.

Timothy P. Clancy

Of the Firm:
RICHARDSON, STOOPS & KEATING
6846 South Canton, Suite 200
Tulsa, Oklahoma 74136
(918) 492-7674

ATTORNEYS FOR PLAINTIFF, VALERIE ANDERSON

Mitchell D. Blackburn

Of the Firm:
HASTIE AND STEINHORN
3000 Oklahoma Tower
210 Park Avenue
Oklahoma City, Oklahoma 73102
(405) 239-6404

ATTORNEYS FOR DEFENDANTS, EZPAWN OKLAHOMA, INC. A/K/A EZPAWN OKIE, INC., AND EZCORP, INC. A/K/A EZPAWN

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FLOYD D. MARKHAM,

Petitioner,

vs.

R. MICHAEL CODY,

Respondent.

No. 93-C-942-B

ORDER

On November 2, 1994, the Court denied the instant petition for a writ of habeas corpus. (Doc. #8.) Petitioner, pro se, has now moved "for relief from judgment" under Fed. R. Civ. P. 60. (Doc. #9.) He contends that this Court erred in disposing of his claim of ineffective assistance of trial counsel with regard to his 1981 conviction on the ground of procedural default. (Doc. #8 at 7-10.) Respondent has objected.

Even if Petitioner's ineffective-assistance-of-trial-counsel claim would not be procedurally barred, Petitioner would not be entitled to habeas corpus relief. To establish ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668, 687 (1984), a habeas petitioner must satisfy a two-part test. First, he must show that his attorney's performance "fell below an objective standard of reasonableness," id. at 688, and second, he must show that there is a "reasonable probability" that but for counsel's error, the outcome would have been different, id. at 694.

Petitioner contends that his 1979 convictions were invalid for enhancement purposes because he was 17 years old at the time of the

convictions and not certified as an adult.[1] In support of this contention Petitioner relies on Lamb v. Brown, 456 F.2d 18 (10th Cir. 1972), where the Tenth Circuit Court of Appeals determined that the 1969 version of the juvenile code, (which permitted males of sixteen and seventeen to be prosecuted as adults, while females of the same age were treated as juveniles unless certified to stand trial as adults) to be unconstitutional because it violated the Equal Protection Clause. See Kelley v. Kaiser, 992 F.2d 1509 (10th Cir. 1993).

Petitioner's reliance on Lamb and Kelley is misplaced. The statute deemed unconstitutional in Lamb was not applied to Petitioner who was properly charged as an adult under Okla. Stat. tit. 10, § 1104.2 (Supp. 1979). Accordingly, Petitioner's trial counsel was not ineffective for failing to investigate the validity of Petitioner's 1979 convictions.

Petitioner's Motion "for relief from judgment (doc. #9) is hereby denied.

SO ORDERED THIS 27th day of Mar., 1995.

THOMAS R. BRETT, Chief Judge
UNITED STATES DISTRICT COURT

[1]The court liberally construes the October 22, 1993 petition to allege this claim although not fully set out therein.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 2 8 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

NORDAM, an Oklahoma general partnership,

Plaintiff,

vs.

NOISE REDUCTION, INC., a Delaware corporation, and SOUND SOLUTION, L.P., a Delaware limited partnership,

Defendants.

Case No. 90-C-1059-H

ENTERED ON DOCKET

DATE MAR 2 8 1995

ORDER

The Court, having considered the JOINT MOTION FOR DISMISSAL WITH FULL PREJUDICE filed by all the parties in this action, and being fully advised, hereby DISMISSES all claims between Plaintiff and Defendants with prejudice and without fees or costs to any party.

Entered

S/ SVEN ERIK HOLMES

Dated: 3-28-95

Sven Erik Holmes
U. S. District Judge

ajg\1995\nor0417

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ULUS GUY JR,

Petitioner,

vs.

RON CHAMPION,

Respondent.

No. 95-C-0055-B

ORDER

At issue before the Court in this habeas corpus action pursuant to 28 U.S.C. § 2254, is Respondent's motion to dismiss the petition as successive and/or abusive under Rule 9(b) of the Rules Governing Section 2254 cases. The Petitioner has objected to Respondent's motion and has filed a motion for appointment of counsel and for leave to amend the petition to allege a claim for "lost records" under Harris v. Champion, 15 F.3d 1538 (10th Cir. 1994).

I. BACKGROUND

Following a mistrial due to prosecutorial misconduct, a jury found Petitioner guilty of second-degree murder and the state court sentenced him to life in prison. Petitioner appealed, raising evidentiary issues, prosecutorial misconduct, and failure to declare a second mistrial. The Oklahoma Court of Criminal Appeals, however, rejected Petitioner's contentions and affirmed the conviction. Guy v. State, 778 P.2d 470 (Okla. Crim. App. 1989). Petitioner then moved for post-conviction relief which the State

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Court denied. The Oklahoma Court of Criminal Appeals affirmed, finding Petitioner's claims procedurally barred.

Thereafter, Petitioner filed two petitions for a writ of habeas corpus in this Court. In the first petition, he raised the following issue:

> I still need my first trial transcript that occurred April 8-9, 1985. It has the same information number CRF-84-4331 the first jury was discharged under this number, therefore the second trial under this number is illegal.

This Court denied relief as the claim was procedurally barred, Case No. 92-C-639-B, and the Tenth Circuit Court of Appeals affirmed. In the second petition, he contended (1) that he had been tried twice for the same crime in violation of the Double Jeopardy Clause, and (2) that his counsel provided ineffective assistance of counsel when he failed to file a motion to dismiss charges because Petitioner was not selected from a live line-up and because he was tried twice for the same crime. Case No. 94-C-1073-B. On March 23, 1995, the Court dismissed that petition as successive and abusive.

In the instant habeas action, Petitioner again challenges the alleged denial of the trial transcript. This time, however, he frames the claim as ineffective assistance of appellate counsel for failing to "hav[e] my first trial transcript produced for direct appeal." (Doc. #1 at 5.) Petitioner also raises two claims of "loss of records" under Harris, 15 F.3d 1538. He alleges that he could not appeal the mistrial because he did not have a transcript available. He also alleges that the transcript is necessary to prove his double jeopardy claim.

II. ANALYSIS

The law regarding dismissal of successive section 2254 petitions is clear. Rule 9(b) states as follows:

> **Successive petitions.** A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

In this case it is undisputed that Petitioner previously filed two habeas corpus actions in this Court and that this Court denied Petitioner's claims with regard to the trial transcript on the merits. Therefore, the Petitioner bears the burden of showing that "'although the ground of the new application was determined against him on the merits on a prior application, the ends of justice would be served by a redetermination of the ground.'" Parks v. Reynolds, 958 F.2d 989, 994 (10th Cir. 1992) (quoting Sanders v. United States, 373 U.S. 1 (1963)), cert. denied, 112 S.Ct. 1310 (1992). In McClesky v. Zant, 499 U.S. 467, 495 (1991), the Supreme Court equated the "ends of justice" inquiry with the "fundamental miscarriage of justice" inquiry. See also Parks, 958 F.2d at 994.

The Supreme Court recently summarized its prior holdings involving a defendant's subsequent use of the habeas writ. In Herrera v. Collins, 113 S.Ct. 853 (1993), the Court stated "that a petitioner otherwise subject to defenses of abusive or successive use of the writ may have his federal constitutional claim considered on the merits if he makes a proper showing of actual innocence. This rule, or fundamental miscarriage of justice

exception, is grounded in the 'equitable discretion' of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons." See also McClesky v. Zant, 499 U.S. 467, 495 (1991); Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986) (plurality opinion); Parks v. Reynolds, 958 F.2d at 995.

The Petitioner has made no colorable showing of actual innocence which would justify reaching the merits of the successive claim raised in the present petition. Nor do Petitioner's claims under Harris v. Champion, 15 F.3d 1538 (10th Cir. 1994), suffice to meet that standard. In Harris, the Tenth Circuit Court of Appeals addressed whether inordinate delay in the filing and processing of a direct criminal appeal provides a sufficient ground to excuse exhaustion of state remedies. Therefore, the Court finds that Petitioner's petition should be dismissed as successive under Rule 9(b).

Even if the Court were to treat Petitioner's claims as new claims under Rule 9(b), the petition would still be subject to dismissal as abusive. Petitioner has not shown adequate cause or prejudice under the strict McCleskey standard for failing to raise that claim in the first habeas petition. See McCleskey v. Zant, 499 U.S. 467 (1991). Nor has he met the narrow miscarriage of justice exception to the cause requirement, as he has not demonstrated that the alleged constitutional violation caused the conviction of an innocent man. Id. at 495.

ACCORDINGLY, IT IS HEREBY ORDERED that:

(1) Respondent's motion to dismiss (doc. #3) is **granted**;

(2) Petitioner's motions to amend habeas petition to allege a claim under Harris and to appoint counsel (docs. #5, and #6) are **denied;**

(3) Petitioner's application for a writ of habeas corpus is **dismissed** as a successive and abusive petition under Rule 9(b) of the Rules Governing Section 2254 cases.

SO ORDERED THIS 27 day of Mar, 1995.

THOMAS R. BRETT, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

KIRBY EASLEY,

Plaintiff,

v.

HORNER FOODS, INC. d/b/a PRICE MART FOOD WAREHOUSE,

Defendant.

Case No. 94-C-115

STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff and Defendant, through their attorneys of record, and pursuant to Federal Rule of Civil Procedure 41(a)(1)(ii), do hereby stipulate that this action should be, and hereby is, dismissed with prejudice. Each party is to bear his or its own costs and attorney fees.

JOHN L. HARLAN & ASSOCIATES

John L. Harlan, OBA No. 3861
P. O. Box 1326
Sapulpa, Oklahoma 74067
(918) 227-2590

ATTORNEY FOR PLAINTIFF
KIRBY EASLEY

NICHOLS, WOLFE, STAMPER, NALLY, FALLIS & ROBERTSON, INC.

Frank B. Wolfe III, OBA No. 9825
400 Old City Hall Building
124 East Fourth Street
Tulsa, Oklahoma 74103-5010
(918) 584-5182

ATTORNEY FOR DEFENDANT
HORNER FOODS dba PRICE MART

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

CLAIR MAXINE RODMAN,)
Plaintiff,)
v.) 93-C-1045-E
SECRETARY OF HEALTH AND HUMAN SERVICES,)
Defendant.)

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Plaintiff Clair Maxine Rodman was awarded Social Security Disability Benefits on February 10, 1993. The Administrative Law Judge (ALJ) determined that Plaintiff's onset date of disability was September 8, 1992. The ALJ found that Plaintiff was not disabled prior to this date. Plaintiff challenges the ALJ's finding concerning the onset date of disability and argues that she has been disabled since April 16, 1991. On appeal, two issues are presented: (1) Did the ALJ err by disregarding the Vocational Expert's opinion regarding Plaintiff's ability to perform alternative forms of work in the national economy; and (2) Did the ALJ improperly deny benefits based on Plaintiff's refusal to completely follow prescribed treatment? For the reasons stated below, the undersigned recommends that the decision of the ALJ partially denying benefits be reversed.

I. Procedural History

Plaintiff was 37 years old at the time of the administrative hearing. She has an 11th grade education and has not engaged in gainful activity since April 16, 1991. She alleges

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that she has been unable to work since this time due to a non-exertional mental impairment.

Plaintiff filed her application for Supplemental Social Security Disability Benefits on April 16, 1991. This application was initially denied and again on review. Following a hearing on September 14, 1992, the ALJ found Plaintiff disabled as of September 8, 1992 and awarded her benefits from this date. The ALJ based the onset date of disability on the fact that Plaintiff's impairments as of September 8, 1992, when she was admitted to Parkside Hospital, met the disability criteria contained in the "Listing of Impairments".[1]nn The ALJ further found that Plaintiff had no impairments or combination of impairments which rendered her disabled prior to this date. However, Plaintiff contends she was disabled on April 16, 1991. Consequently, the issue presented is whether Plaintiff was disabled from April 16, 1991 to September 8, 1992.[2]

In evaluating an applicant's condition to determine whether a disability exists, the ALJ must proceed through a five step analysis: (1) Is the claimant presently pursuing work that constitutes substantial gainful activity?[3] (2) Does the claimant have a severe impairment?[4] (3) Does the claimant's impairment meet or equal a listed impairment?[5] (4)

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[1] *20 C.F.R. §404, Subpt. P, App. 1.*

[2] *Plaintiff does not challenge the ALJ's finding that she is disabled. Instead, she argues that the ALJ should have found the onset date of disability to be April 16, 1991 rather than September 14, 1992.*

[3] *If the claimant is working and the work is considered substantial gainful activity, the claimant will not be considered disabled regardless of medical condition, age, or work experience.*

[4] *If the claimant does not have an impairment or combination of impairments which significantly limits her physical or mental ability to do basic work activities, the claimant will not be considered disabled.*

Does the impairment, when considered together with the claimant's residual functional capacity ("RFC") and the mental and physical demands of employment, prevent her from doing her past relevant work?[6] and (5) Taking into consideration the claimant's age, education, past work experience, and RFC, can she perform other work in the national economy?[7]

In this case, the ALJ performed the five-step analysis, finding that (1) Plaintiff has not performed any substantial gainful activity since April 16, 1991; (2) Plaintiff has vocationally severe mental and physical impairments; (3) As of September 8, 1992, Plaintiff meets the medical criteria for sections 12.04 (Affective Disorders), 12.08 (Personality Disorders), and 12.09 (Substance Addiction Disorders) in the Listings.

For the period at issue, April 16, 1991 to September 8, 1992, the ALJ found Plaintiff did not meet any medical criteria at step 3. Therefore, it became necessary to proceed with steps four and five of the analysis. At step four, the ALJ found that Plaintiff could not perform her past relevant work. However, at step five, the ALJ found that Plaintiff's impairments did not prevent her from performing other work in the national economy prior to September 8, 1992.

II. Standard of Review

Judicial review of the Secretary's decision is governed by 42 U.S.C. §405(g). On review, the role of the Court on appeal is to determine whether the Secretary's decision is

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[5] *If claimant has an impairment which meets the duration requirement and is included in the "Listing of Impairments" or is equal to a listed imparment, she is considered disabled.*

[6] *If claimant can still do this type of work, she is not disabled.*

[7] *See, 20 C.F.R. §§404.1520(b)-(f). If other types of work can be performed, the claimant is not disabled.*

supported by substantial evidence and whether the Secretary applied the correct legal standard. *Emory v. Sullivan*, 936 F.2d 1092, 1093 (10th Cir. 1991). The reviewing court does not weigh the evidence and may not substitute its discretion for that of the agency. *Sorenson v. Bowen*, 888 F.2d 706 (10th Cir. 1989). Substantial evidence is relevant evidence that is more than a mere scintilla, but less than a preponderance and such evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971). Evidence is not substantial if it is "overwhelmed by other evidence or it is actually mere conclusion." *Ellison v. Sullivan*, 929 F.2d 534, 536 (10th Cir. 1990). A substantial evidence test on review does not permit a simple search of the record for isolated bits of evidence which support a preconceived conclusion. *Dollar v. Bowen*, 821 F.2d 530, 550 (10th Cir. 1987).

An individual seeking Social Security benefits bears the burden of proving that because of his disability, he is unable to perform his prior work activity. *Andrade v. Secretary of Health and Human Services*, 985 F.2d 1045, 1050 (10th Cir. 1993). Once the claimant makes a *prima facie* case that he is disabled, the burden shifts to the Secretary to prove that the claimant retains the ability to engage in other types of work and that jobs which he can perform exist in the national economy. *Nielson v. Sullivan*, 992 F.2d 1118, 1120 (10th Cir. 1993).

III. Legal Analysis

The primary issue on appeal is whether the ALJ properly evaluated Plaintiff's ability to seek alternative forms of work at step five of the sequential analysis. Disability is defined as the inability to engage in any substantial gainful activity by reason of any

medically determinable physical or mental impairment. *Gossett v. Bowen*, 862 F.2d 802, 804 (10th Cir. 1988). In the instant case, the ALJ properly evaluated the evidence for steps one through four. The undersigned finds, however, that the ALJ did not properly consider the testimony of the Secretary's Vocational Expert under step five in determining whether Plaintiff was capable of performing an alternative form of work in the national economy.

The record reveals that Plaintiff has a long history of paint sniffing, alcohol abuse, drug abuse, suicidal ideation, psychotic thoughts, auditory hallucinations, and depression. Plaintiff's treating physician at Mental Health Care Services, Inc. (Parkside) found that as of April 1991, she had a global assessment of functioning (GAF) of 40. The consultative psychiatrist hired by the Social Security Administration examined Plaintiff in July 1991. At that time, he found Plaintiff had a current GAF of 45 and her highest GAF in the past year was 50.[8] The record provides no evidence indicating that Plaintiff's GAF improved from July 1991 to September 1992.

An individual shall be determined to be under a disability only if his physical or mental impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy. *Id.* In the hypothetical the ALJ posed to the Vocational Expert, he included a GAF of 45 to 50 as one of the non-exertional limitations. In response, the Vocational Expert testified that an individual with a GAF at this level would not be capable of doing any type of work, and no jobs would

[8]*The DSM-IIIr defines a GAF of 50 as "seriously impaired ability to function in an occupation." The lower an individual's GAF, the more severe the mental impairment.*

exist in the workplace. (TR 77). He further testified that, based on the Plaintiff's low GAF and other non-exertional limitations (lack of concentration, inability to relate to co-workers and supervisors, inability to be consistent in mood and effect), no jobs would exist in the national economy for her (TR 79).

If the Secretary determines the claimant cannot return to his prior work activity, the Secretary bears the burden to prove that the applicant can find other employment in the economy. *Diaz v. HHS*, 898 F.2d 774 (10th Cir. 1990) (citing *Channel v. Heckler*, 747 F.2d 577, 579 (10th Cir. 1984). In the instant case, the testimony of the Secretary's Vocational Expert clearly establishes that no alternative jobs exist in the workplace for Plaintiff. Furthermore, it is clearly established in the record that Plaintiff's low GAF and other non-exertional limitations (lack of concentration, inability to relate to co-workers and supervisors, inability to be consistent in mood and effect), render her incapable of performing any type of work even if such work existed.

It is clear from the record that the Secretary has failed to demonstrate that any jobs exist in the national economy for Plaintiff for the period in question. Furthermore, the ALJ disregarded the testimony of the Secretary's Vocational Expert. In disregarding this testimony, the ALJ effectively concluded that Plaintiff was capable of performing alternative forms of work; yet failed to specifically so find. This is an abuse of the ALJ's discretion. As such, the ALJ's decision to deny benefits from April 16, 1991 to September 8, 1992 is not supported by substantial evidence.

The ALJ also found that Plaintiff possessed a lack of motivation in following prescribed treatment for her psychological problems. *Record on Appeal at 16.* "In order to

get benefits, you must follow treatment prescribed by your physician if this treatment can restore your ability to work." *20 C.F.R. §404.1530.* On April 26, 1991, Plaintiff was admitted to Mental Healthcare Services, Inc. Her prescribed treatment included outpatient psychotherapy and participation in a chemical dependency program. Plaintiff continued this treatment program on a sporadic basis until April 30, 1992. At that time, Plaintiff's chart was closed because she "lacked the motivation" to engage in further treatment.

Courts reviewing whether a claimant's failure to undertake treatment will preclude the recovery of disability benefits have considered four elements, each of which must be supported by substantial evidence: (1) the treatment at issue should be expected to restore the claimant's ability to work; (2) the treatment must have been prescribed; (3) the treatment must have been refused; (4) the refusal must have been without justifiable excuse. *Teter v. Heckler*, 775 F.2d 1104, 1107 (10th Cir. 1985) (citing *Jones v. Heckler*, 702 F.2d 950, 953 (11th Cir. 1983)).

At issue is the first element.

The governing question is not merely whether Plaintiff's *condition* would have improved had she followed the prescribed treatment. Rather, it is whether the prescribed treatment would have restored Plaintiff's *ability to work*. Although the record demonstrates that Plaintiff's non-exertional mental impairments have a tendency to improve somewhat when she undergoes a regular course of prescribed treatment, there is no substantial evidence presented to support the conclusion that this type of treatment would have restored her *ability to work*. The only evidence presented regarding this point is the Secretary's statement that this treatment would have restored Plaintiff's ability to work.

This statement, absent other support, is insufficient. Therefore, the ALJ's refusal to grant disability benefits for the period at issue based on Plaintiff's refusal to complete prescribed treatment is not supported by substantial evidence. No medical testimony is now before the Court which links a prospective restoration of her ability to work with completion of the prescribed course of treatment.

IV. Conclusion

The ALJ found Plaintiff disabled as of September 8, 1992. However, Plaintiff, for purposes of this appeal, contends she was disabled as early as April 16, 1991. Review of the record shows that Plaintiff is correct. The Secretary has not met her burden at step five (5) of the sequential analysis. Specifically, the ALJ disregarded the Vocational Expert's assessment that no jobs existed for Plaintiff and, therefore, abused his discretion in denying disability benefits to Plaintiff. In addition, the Secretary has not produced substantial evidence demonstrating that, notwithstanding the foregoing, had Plaintiff completely followed her prescribed treatment, her *ability to work* would have been restored.

Therefore, the United States Magistrate Judge recommends that the Secretary's decision partially denying benefits be REVERSED. Benefits should be awarded as of April 16, 1991.

Any objections to this Report and Recommendation must be filed with the Clerk of Courts within ten (10) days of the receipt of this notice. Failure to file objections within the specified time waives the right to appeal the District Court's order.[9]

[9] *See Moore v. United States of America, 950 F.2d 656 (10th Cir. 1991).*

Dated this 25th day of March, 1995.

JEFFREY S. WOLFE
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CHERYL L. REEDER,

Plaintiff,

vs.

AMERICAN ECONOMY INSURANCE COMPANY, a foreign corporation,

Defendant.

Case No. 93-C-991-B

ORDER

Before the Court for Consideration are Plaintiff Cheryl L. Reeder's Motion to Amend, Alter or Vacate the Judgment Entered on December 23, 1994, on the issue of Bad Faith (Docket #69), and Renewal of Motion for Judgment as a Matter of Law, or in the alternative, Motion for New Trial (Docket #71), and Defendant American Economy Insurance Company's Motion to Determine Set-Off/Credit (Docket #77).

This case originated as a declaratory judgment action filed by American Economy Insurance Company (AEIC) against Cheryl L. Reeder (Reeder). AEIC asked the Court to determine that AEIC owed no money to Reeder on her uninsured motorist policy because she waited more than three years to make her claim. Reeder filed a counterclaim for bad faith and damages under the policy. The Court entered summary judgment on August 26, 1994, in favor of AEIC on the bad faith claim, and in favor of Reeder on the issue of coverage. A jury trial was held on December 19-21, 1994, on the amount of damages; the jury returned a verdict in favor of Reeder for $612,000.

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The Court first addresses Reeder's Motion to Amend, Alter or Vacate the Judgment Entered on the issue of bad faith. Reeder requests that the judgment be amended to clearly state that it only dealt with whether there was a 90-day time limit regarding the bad-faith issue. Reeder also requests leave to amend her counterclaim to add another claim for bad faith. She alleges that this bad faith claim is based upon facts that occurred subsequent to the time she filed her counterclaim.[1]

Reeder alleges that she could not have filed her claim until August 26, 1994, the date on which this Court issued its Order on the bad faith and coverage issues. However, Reeder filed an amended counterclaim on September 1, 1994, alleging that AEIC breached the insurance policy by refusing to timely and promptly evaluate her damages. This Court, however, overruled Reeder's motion to file the amended counterclaim on October 20, 1994. The Court sees no reason, and Reeder has provided none, to now allow an amendment that already has been expressly overruled. The Court refers the parties to its Order entered on October 20, 1994, and the reasons cited therein. Therefore, Reeder's motion to amend the judgment and for leave to file an amended claim is hereby DENIED.

The Court next addresses Reeder's Renewal of Motion for Judgment as a Matter of Law, or in the alternative, Motion for New Trial. Motions for judgment as a matter of law, pursuant to

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[1]The proposed counterclaim alleges that AEIC never evaluated Reeder's injuries or assigned a dollar value to her claim, thereby violating the public policy of Oklahoma by not dealing with Reeder in good faith.

Fed.R.Civ.P. 50, should be granted only when the evidence so conclusively favors one party that reasonable persons would be unable to arrive at a different result. Western Plains Service Corp. v. Ponderosa Development Corp., 769 F.2d 654 (10th Cir. 1985). Judgment as a matter of law "should be cautiously and sparingly granted." Lucas v. Dover Corp., 857 F.2d 1397 (10th Cir. 1988), *quoting* E.E.O.C. v. Prudential Federal Sav. & Loan Ass'n, 763 F.2d 1166 (10th Cir. 1985). In reviewing the evidence, the Court must draw all reasonable inferences in favor of the party opposing the motion and may only grant the motion when the evidence points but one way and is susceptible of no reasonable inferences that may sustain the opposing party's position. Prudential, 763 F.2d 1166.

Reeder first requests that the Court direct a verdict for $1.5 million or in the alternative grant a new trial as the jury verdict of $612,000 is wholly inadequate. Reeder states that the only evidence as to the value of Reeder's damages was presented by Reeder and her economist, Dr. John Bonham. Reeder points to Buzzard v. Farmers Ins. Co., Inc., 824 P.2d 1105 (Okla. 1991), for the proposition that the insurer, not the insured, has the duty to assign a dollar value to the claim, but AEIC failed to do so. Due to this failure, Reeder states, her evidence that damages totaled $1.5 million was uncontroverted.

The Court first notes that Buzzard is a case that deals with bad faith. There was no issue of bad faith submitted to the jury in this case as the Court already had ruled on the subject; therefore, Buzzard is inapplicable. Further, the jury verdict

indicates that there was a legitimate dispute as to damages; the verdict was not, under the evidence presented, inadequate.

Reeder next alleges that the Court should direct a verdict for $1 million, or grant a new trial, because the jury verdict was wholly inadequate as compared to AEIC's "evaluation" of Reeder's injuries as being $1 million. Reeder also alleges that the Court erred in excluding Reeder's Exhibit No. 9, which was a letter dated December 8, 1994, from AEIC attorney Eugene Robinson that offered $1 million to settle this case.[2] Reeder alleges that AEIC evaluated Reeder's loss as $1 million, pursuant to its duty as outlined in Buzzard. Therefore, Reeder states, the question for the jury was whether AEIC's $1 million evaluation of Reeder's claim was or was not reasonable. However, the Court excluded Robinson's letter as a settlement offer, pursuant to Fed.R.Evid. 403 and 408. Rule 408 states in pertinent part:

> Evidence of ... offering ... a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount.

Reeder alleges that the letter was not an offer, but instead was an evaluation of Reeder's injuries as required by Buzzard. As stated previously, Buzzard is inapplicable to this case. Reeder also states that, if the letter was an offer, it should not have been excluded under Rule 408. She alleges that Rule 408 prevents

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[2]Reeder claims that this letter, which the Court ruled was a settlement offer and, therefore, excluded under Fed.R.Evid. 408, is not a settlement offer but is an evaluation of Reeder's injuries.

offers from being used to prove liability; however, AEIC's liability already had been established. Therefore, the letter should have been admitted. However, the Court remains of the view that the letter is clearly a settlement offer that is inadmissible under Rule 408.

Reeder also alleges that the Court erred in denying her motion to amend the Pre-Trial Order and Answer to add Exhibit No. 9. As previously stated, this exhibit--the settlement offer by AEIC--is inadmissible.

Reeder next alleges that the Court erred in making Reeder the plaintiff for purposes of trial, and placing the burden of proof upon her. She alleges that this relieved AEIC of its duty to timely and promptly evaluate her injuries, thereby violating the public policy of Oklahoma. Reeder states that AEIC, because it initiated this declaratory judgment action, had the burden to prove it is not liable. It is black-letter law that the proponent of an issue always has the burden of proof. *See* Owens v. Sun Oil Co., 482 F.2d 564, 567 (10th Cir. 1973). For the purposes of her counterclaim, Reeder was, in effect, the plaintiff and had the burden of proof as to the extent of her damages. By way of previous summary judgment ruling, the Court had found against Plaintiff AEIC concerning AEIC's declaratory judgment request of no coverage.

Reeder next alleges that the Court erred in not permitting the policy limit to go to the jury, although it was stipulated in the

Pre-Trial Order that the policy limit was $1.5 million.[3] She alleges that an action on an uninsured motorist (UM) insurance policy is contractual, and that the policy limit was a necessary contractual provision that should have been disclosed to the jury. Reeder cites Daigle v. Hamilton, 782 P.2d 1379 (Okla. 1989), for the proposition that policy limits are admissible when the action is directly against the injured party's insurer, as is the case here. However, Daigle addresses only the issue of whether coverage should be revealed to the jury, not whether policy limits should be revealed. Several other states, however, have considered this issue and determined that the UM policy limit is not relevant. *See* Harvey v. Mitchell, 522 So.2d 771 (Ala. 1988) ("[T]he amount of uninsured motorist coverage available was not relevant to any issue before the Court. In addition, the possible prejudice resulting from its admission into evidence was great."); Robinson v. Murlin Phillips & MFA Ins. Co., 557 S.W.2d 202 (Ky. 1977) ("We concede that the policy limits are immaterial when, as here, there is no dispute about them and there is, consequently, no contested issue of fact for the jury to decide."); and Allstate Ins. Co. v. Miller, 553 A.2d 1268 (Md. 1989) ("Where the insurance carrier is a party to the suit, the existence of insurance obviously cannot be kept from the jury; however the amount of uninsured motorist coverage should not be disclosed, unless the amount is in controversy.").

[3]The policy limits were excluded under Fed.R.Evid. 403. The Court found that the relevance, if any, would be substantially outweighed by the danger of unfair prejudice to AEIC.

The Court remains of the view that the policy limits were properly excluded from the consideration of the jury.[4]

Reeder next alleges that the jury trial proceedings, the jury verdict and the judgment of the Court are in contravention of the public policy of the state of Oklahoma, as espoused in Buzzard. However, as the Court previously noted, Buzzard is inapplicable to this case due to the Court's Order filed on August 26, 1994, against Reeder on the issue of bad faith.

Reeder next alleges that she is entitled to recover on each of three separate UM "policies" in the amount of $500,000 each because the jury verdict exceeds the amount of coverage for each of the three vehicles insured under Reeder's policy with AEIC. Pursuant to 36 O.S. § 3636, Reeder alleges, the Court must award the full amount of the policy because the damages exceed the amount of the policies. The parties stipulated in the Pre-Trial Order that the available coverage was $1.5 million. *See* Richardson v. Allstate Ins. Co., 619 P.2d 594 (Okla. 1980), regarding stacking of UM coverage. Due to Oklahoma's law allowing stacking, Reeder will be able to recover the amount of the jury award ($612,000). For the reasons stated above, Reeder's motion for judgment as a matter of law, or in the alternative for a new trial, is hereby DENIED.

The Court next addresses AEIC's Motion to Determine Set-

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[4]The record reveals that Reeder's counsel had Reeder disclose to the jury the $1.5 million insurance coverage limit in direct violation of the Court's order not to do so. (*See* Transcript of Cheryl Reeder's testimony, filed December 20, 1994, at p. 2).

Off/Credit.[5] AEIC alleges that it is entitled to a $65,000 set-off or credit for the amounts paid to Reeder by other liability insurers for her injuries.[6] The UM endorsement in Reeder's insurance policy states that:

> Any amount payable for damages under this insurance shall be reduced by all sums paid by or for anyone who is legally responsible, including all sums paid for the same damages under the policy's liability insurance.

Reeder alleges, however, that this provision violates the public policy of Oklahoma by impermissibly limiting UM coverage. Therefore, the question before the Court is whether the contract provision controls, or whether it is void as violative of Oklahoma public policy.

Oklahoma's uninsured motorist statute, 36 O.S. § 3636, states, in pertinent part:

> Provided further, that any payment made by the insured tort-feasor, shall not reduce or be a credit against the total liability limits as provided in the insured's own uninsured motorist coverage.

36 O.S. § 3636(E).

AEIC alleges that allowing set-off will not affect the "total

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[5]The Court held a hearing on March 8, 1995, on this issue.

[6]Reeder received $10,000 from Mid-Continent Casualty Company, who insured the vehicle operated by tort-feasor Johnny Lewis; $10,000 from Oklahoma Surety Company, who provided plaintiff's brother Tommy Reeder with underinsured motorist coverage; another $20,000 from Mid-Continent, who provided Reeder's parents with uninsured motorist coverage; and $25,000 from State Farm, who provided uninsured motorist coverage to the owners of the car in which Reeder was riding at the time of the accident. Reeder first stated the carrier for Lewis was State Farm Insurance, but at the March 8 hearing, Reeder's attorney said the carrier was Mid-Continent. Regardless, the amount is not in dispute.

liability limits" because Reeder still will be made whole: her damages are $612,000, and she will receive a total of $612,000. AEIC argues that all Oklahoma cases construing this provision (and disallowing set-offs) deal with situations in which the plaintiff's injuries equal or exceed the amount of the insurance coverage; therefore, allowing such set-offs would reduce the total amount of compensation paid to the plaintiff. In this case, however, Reeder's injuries do not exceed the amount of the UM coverage. If no set-off is allowed, AEIC says, Reeder receives double recovery.

Oklahoma courts often have reiterated their position that once a person is insured under a UM policy, "subsequent exclusions inserted by the insurer in the policy which dilute and impermissibly limit UM coverage are void as violative of the public policy espoused by § 3636." Roberts v. Mid-Continent Casualty Company, 790 P.2d 1121, 1123 (Okla. 1989). The Roberts court held that § 3636(E) clearly evinces that "the legislature intended that payments made by a tort-feasor should not diminish the injured party's recovery under his own policy." Id. The Roberts court further held that an insurance company should have the burden of recovering the tort-feasor's liability insurance through a subrogation action.[7] "To require an automatic set-off of the amount of liability coverage held by a tort-feasor would render the subrogation provisions ineffective and would also ignore the plain language of § 3636(E) ...." Id. at 1124.

[7]The fact that the subrogation rights no longer exist--as is the case here--does not affect this holding. Id. at 1124.

Further, the Oklahoma Supreme Court in Chambers v. Walker, 653 P.2d 931 (Okla. 1982), held that an insurance clause providing set-off of any workers' compensation benefits received was a violation of Oklahoma public policy. The Chambers court rejected the "net recovery theory".[8] "Since the intention of the legislature is so clear that payments made by a tort-feasor should not diminish the injured party's recovery under his own policy, it is even more likely that the set-off of benefits recovered from a collateral source would be prohibited." Id. at 935.

The Oklahoma Court of Appeals later explained Chambers:

> The [UM] carrier argued in Chambers that it should be allowed set-off in the amount plaintiff would have lost through subrogation of the workers' compensation carrier, since the net recovery to plaintiff would be the same. The Court denied the set-off, reasoning that application of the net recovery theory would result in a windfall to the insurer in derogation of the clear legislative intent in favor of [UM] coverage.

Bill Hodges Truck Co. v. Humphrey, 704 P.2d 94, 95 (Okla. App. 1985).

The Oklahoma Supreme Court cited with favor Justice Opala's dissent in Tidmore v. Fullman, 646 P.2d 1278 (Okla. 1982), regarding set-off under § 3636:

> [T]he claim of a § 3636 insured is no longer

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[8]The insurance carrier in Chambers argued that it should have been allowed to deduct from its UM coverage any amount the plaintiff would have lost through subrogation of the workers' compensation carrier, since the net recovery would have been the same. If the Chambers uninsured motorist had carried a liability policy, the plaintiff would not have been allowed to keep both his recovery from the motorist and his workers' compensation benefits. Id. at 932.

> reducible by the limit of the tort-feasor's public liability protection. 36 O.S.1981 § 3636(C) and (E).... Nor may it be diminished by the insurance protection available to the adverse vehicle. The new indemnity of the § 3636 carrier is not partial but total. Whenever the coverage applies, the insured gets it all from the carrier.

Roberts, 790 P.2d at 1123, *citing* Tidmore, 646 P.2d 1278.

AEIC is correct in its assertion that the cases cited above deal with situations in which the plaintiff's damages exceed the limits of all applicable insurance policies. However, considering the plain language of § 3636(E), the Oklahoma Supreme Court's construction of the legislative intent of § 3636, and the Chambers case, the Court believes that the contract provision is void as violative of the public policy of Oklahoma as espoused in § 3636(E). Section 3636(E) clearly disallows set-off for the $10,000 payment from the tort-feasor's insurance carrier. The Court believes that the remainder of the payments are collateral sources and also should not be set off. *See* Chambers. Therefore, the Court holds that AEIC is not entitled to set-off for the sums previously paid to Reeder by other carriers.[9] AEIC's Motion for Set-Off/Credit of $65,000 is hereby DENIED.

IT IS SO ORDERED THIS 24th DAY OF MARCH, 1995.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

[9]This result renders the term "underinsured" a misnomer. Such an interpretation makes the claimant now "overinsured"; but that seems to be the law of Oklahoma.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

In Re:

DAVID WAYNE STARKEY
d/b/a Green Acres Exotics,

Debtor/Appellant,

No. 95-C-156-K

O R D E R

The above captioned Debtor/Appellant ("Debtor") sought emergency relief in this Court to stay an impending liquidation of assets and to direct that the bankruptcy court convert the case from chapter 7 bankruptcy to chapter 12 bankruptcy.

On March 13, 1995, the Court held a hearing and evaluated the arguments of various attorneys involved in the case. At the close of that hearing, the Court denied the Debtor's Application for relief. This Court found that neither a writ of mandamus nor an emergency stay was justified in light of the facts of the case, the applicable legal standards, and the equitable principles animating bankruptcy law.

The Court hereby incorporates the findings of fact and conclusions of law stated at the hearing and denies the requested relief to the Debtor.

For the reasons discussed above, the Application is denied.

ORDERED this 23 day of March, 1995.

Terry C. Kern

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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ENTERED ON DOCKET

DATE MAR 27 1995

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

IN RE:	)	
	)	M-1417
ASBESTOS LITIGATION,	)	ASB (I)-6752

FILED

MAR 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN

JESSIE MARIE YARBROUGH, Surviving Spouse and Next of Kin of RAY VERNON YARBROUGH, Deceased,	)	
Plaintiff,	)	
vs.	)	Case No. 89-CV-131-K
FIBREBOARD CORPORATION, et al.,	)	
Defendants.	)	

ORDER OF DISMISSAL

The Court has reviewed the Stipulation of Dismissal with Prejudice filed by plaintiff Jessie Marie Yarbrough and defendant Georgia-Pacific Corporation and finds that plaintiff's action against defendant Georgia-Pacific Corporation should be and is hereby dismissed with prejudice, each party to pay their own costs and attorneys' fees.

s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

APPROVED:

Randall K. Iola for

Mark H. Iola, Esq.
Ungerman & Iola
1323 East 71st Street
Suite 300
P.O. Box 701917
Tulsa, Oklahoma 74170-1917
(918) 495-0550

ATTORNEY FOR PLAINTIFF

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Kenneth L. Buettner

Kenneth L. Buettner
10th Floor, Two Leadership Square
Oklahoma City, Oklahoma 73102
Telephone: (405) 235-9621

ATTORNEY FOR DEFENDANT GEORGIA-PACIFIC CORPORATION

/buet/gp_o_stip_dis

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

PAULA ELICH and MARK ELICH,

Plaintiffs,

vs.

BLUE CROSS AND BLUE SHIELD OF OKLAHOMA,

Defendant.

No. 94-C-382-K

O R D E R

A Pretrial Conference was held in this ERISA action on March 9, 1995. At that time, counsel for the defendant raised the possibility that proper notice of claim denial had not been provided to the plaintiffs. Defense counsel suggested a remand of this action to defendant Blue Cross might be in order to evaluate additional evidence now in the possession of plaintiffs. Defense counsel cited Wolfe v. J.C. Penney Co., 710 F.2d 388, 393 (7th Cir.1983), which stated the appropriate remedy for a procedural violation is remand to the fiduciary for a new determination of the claim. The Court asked the parties to advise at a later time of their decision. By telephone, defendant consented to a remand but plaintiffs did not.

Contrary to Wolfe is Vanderklok v. Provident Life & Accident Ins. Co., 956 F.2d 610, 617 (6th Cir.1992), holding a remand to the fiduciary is not necessary. The Court concludes remand is not required under ERISA and would constitute an unnecessary delay under the facts of this case. The Court construes defense

counsel's statement as an oral motion to remand, and as such it will be denied.

It is the Order of the Court that the motion of the defendant to remand this case for reconsideration of plaintiffs' claim is hereby DENIED.

ORDERED this 23 day of March, 1995.

Terry C. Kern

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CLARK MORRIS; BOBBIE J. MORRIS a/k/a BOBBIE MORRIS; THE UNKNOWN HEIRS, EXECUTORS, ADMINISTRATORS, DEVISEES, TRUSTEES, SUCCESSORS AND ASSIGNS OF BUCK HENDERSON, Deceased; WANDA J. HENDERSON; ANITA J. HENDERSON; CURTIS HENDERSON; NATHANIEL HENDERSON; BEATRICE HENDERSON; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

CIVIL ACTION NO. 94-C-67-K

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 24 day of March, 1995. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney; the Defendant, County Treasurer, Tulsa County, Oklahoma, appears by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, Board of County Commissioners, Tulsa County, Oklahoma, appears not, having previously claimed no right, title or interest in the subject property; and the Defendants, Clark Morris; Bobbie J. Morris aka Bobbie Morris aka Bobbie Jean Morris; The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Buck Henderson, Deceased; Wanda J. Henderson; Anita J.

Henderson; Curtis Henderson; Nathaniel Henderson; and Beatrice Henderson, appear not, but make default.

The Court, being fully advised and having examined the court file, finds that the Defendant, Clark Morris, was served with Summons and Amended Complaint on April 21, 1994; the Defendant, Bobbie J. Morris aka Bobbie Morris aka Bobbie Jean Morris, was served with Summons and Amended Complaint on April 21, 1994; that Defendant, Wanda J. Henderson, acknowledged receipt of Summons and Amended Complaint on April 18, 1994; the Defendant, Anita J. Henderson was served with Summons and Amended Complaint on June 22, 1994; the Defendant, Curtis Henderson acknowledged receipt of Summons and Amended Complaint on April 20, 1994; the Defendant, Nathaniel Henderson, acknowledged receipt of Summons and Amended Complaint on April 17, 1994; the Defendant, Beatrice Henderson, acknowledged receipt of Summons and Amended Complaint on April 17, 1994; the Defendant, County Treasurer, Tulsa County, Oklahoma, acknowledged receipt of Summons and Amended Complaint on April 18, 1994; and the Defendant, Board of County Commissioners, Tulsa County, Oklahoma, acknowledged receipt of Summons and Amended Complaint on April 15, 1994.

It appears that the Defendants, County Treasurer, Tulsa County, Oklahoma, filed his Answer on February 15, 1994; the Defendant, Board of County Commissioners, Tulsa County, Oklahoma, filed its Answer on February 16, 1994, claiming no right, title or interest in the subject property; and that the Defendants, Clark Morris; Bobbie J. Morris aka Bobbie Morris aka Bobbie Jean

Morris; The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Buck Henderson, Deceased; Wanda J. Henderson; Anita J. Henderson; Curtis Henderson; Nathaniel Henderson; and Beatrice Henderson, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendants, The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Buck Henderson, Deceased, were served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning November 23, 1994 and continuing through December 28, 1994, as more fully appears from the verified proof of publication duly filed on January 18, 1995; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(C)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Buck Henderson, Deceased, and service cannot be made upon said Defendants within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendants without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants, The Unknown Heirs, Executors,

Administrators, Devisees, Trustees, Successors and Assigns of Buck Henderson, Deceased. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting on behalf of the Secretary of Veterans Affairs, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known places of residence and/or mailing addresses. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

The Court further finds that on October 29, 1993, Clark Morris and Bobbie J. Morris filed their voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 93-03511-W, and were discharged on February 11, 1994.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Four (4), Block (5), Suburban Acres Second Addition to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded plat thereof.

The Court further finds that this is a suit brought for the further purpose of judicially determining the death of Buck Henderson and of judicially determining the heirs of Buck Henderson.

The Court further finds that Buck Henderson, a single man, became the record owner of the real property involved in this action by virtue of that certain General Warranty Deed dated January 27, 1976, which was filed in the records of the County Clerk of Tulsa County, Oklahoma, on February 11, 1976 in Book 4202, Page 1329.

The Court further finds that Buck Henderson died on April 17, 1993, while seized and possessed of the real property being foreclosed. The Certificate of Death No. 10286 was issued by the Oklahoma State Department of Health certifying Buck Henderson's death.

The Court further finds that on March 22,1 971, the Defendants, Clark Morris and Bobbie J. Morris, husband and wife, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, their mortgage note in the amount of $10,000.00, payable in monthly installments, with interest thereon at the rate of four and one-half percent (4.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, Clark Morris and Bobbie J. Morris, husband and wife, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, a mortgage dated March 22, 1971, covering the above-described property. Said mortgage was recorded on March 23, 1971, in Book 3961, Page 747, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, Clark Morris and Bobbie J. Morris aka Bobbie Morris aka Bobbie Jean Morris, made default under the terms of the aforesaid note and mortgage by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, Clark Morris and Bobbie J. Morris aka Bobbie Morris aka Bobbie Jean Morris, are indebted to the Plaintiff in the principal sum of $4,007.06, plus interest at the rate of 4.5 percent per annum from June 22, 1993 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of $404.66 ($56.72 fees for service of Summons and Complaint, $347.94 publication fees).

The Court further finds that the Plaintiff is entitled to a judicial determination of the death of Buck Henderson and to a judicial determination of the heirs of Buck Henderson.

The Court further finds that the Defendant, County Treasurer, Tulsa County, Oklahoma, has a lien on the property

which is the subject matter of this action by virtue of 1993 personal property taxes in the amount of $2.00 which became a lien on the property. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, Board of County Commissioners, County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that the Defendants, Clark Morris; Bobbie J. Morris aka Bobbie Morris aka Bobbie Jean Morris; The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Buck Henderson, Deceased; Wanda J. Henderson; Anita J. Henderson; Curtis Henderson; Nathaniel Henderson; and Beatrice Henderson, are in default and have no right, title or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment in rem against the Defendants, Clark Morris and Bobbie J. Morris aka Bobbie Morris aka Bobbie Jean Morris, in the principal sum of $4,007.06, plus interest at the rate of 4.5 percent per annum from June 22, 1993 until judgment, plus interest thereafter at the current legal rate of 6.57 percent per annum until paid, plus the costs of this action in the amount of $404.66 ($56.72 fees for service of Summons and Complaint, $347.94 publication fees), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the death of Buck Henderson be and the same is hereby judicially determined to have occurred on April 17, 1993, in the City of Tulsa, County of Tulsa, State of Oklahoma.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the only known heirs of Buck Henderson are Wanda J. Henderson, Anita J. Henderson, Curtis Henderson, Nathaniel Henderson, and Beatrice Henderson, and that despite the exercise of due diligence by Plaintiff and its counsel, no other known heirs of Buck Henderson, Deceased, have been discovered and it is hereby judicially determined that Wanda J. Henderson, Anita J. Henderson, Curtis Henderson, Nathaniel Henderson, and Beatrice Henderson are the only known heirs of Buck Henderson, Deceased, and that Buck Henderson, Deceased, has no other known heirs, executors, administrators, devisees, trustees, successors and assigns; and the Court approves the Certificate of Publication and Mailing filed by Plaintiff regarding said heirs.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, County Treasurer, Tulsa County, Oklahoma, have and recover judgment in the amount of $2.00 for personal property taxes for the year 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Clark Morris; Bobbie J. Morris aka Bobbie Morris aka Bobbie Jean Morris; The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Buck Henderson, Deceased; Wanda J. Henderson; Anita J. Henderson; Curtis Henderson; Nathaniel Henderson; Beatrice Henderson; and the Board

of County Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell, according to Plaintiff's election with or without appraisement, the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of $2.00, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the

Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney

for PETER BERNHARDT, OBA #741
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

DICK A. BLAKELEY, OBA #852
Assistant District Attorney
Attorney for Defendant,
County Treasurer,
Tulsa County, Oklahoma

Judgment of Foreclosure
USA v. Clark Morris, et al.
Civil Action No. 94-C-67-E

PB/esf

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff,	)	
v.	)	CIVIL ACTION NO. 94-C-1066-B
THE SUM OF ONE THOUSAND FIVE HUNDRED DOLLARS ($1,500.00), Defendant.	)	

JUDGMENT OF FORFEITURE

This cause having come before this Court upon the plaintiff's Motion for Judgment of Forfeiture by Default, by Stipulation, and by Disclaimer as to the $1,500 defendant funds and all entities and/or persons interested in the $1,500 defendant funds, the Court finds as follows:

The verified Complaint for Forfeiture In Rem was filed in this action on the 15th day of November 1994, alleging that the defendant funds were subject to forfeiture pursuant to 21 U.S.C. § 881(a)(6), because they represent funds which were furnished in exchange for a controlled substance, or are proceeds traceable to such an exchange, in violation of the drug prevention laws of the United States, and subject to seizure and forfeiture to the United States.

Warrant of Arrest and Notice In Rem was issued on the 22nd day of November 1994, by the Clerk of this Court to the United States Marshal for the Northern District of Oklahoma for

the seizure and arrest of the defendant funds and for publication in the Northern District of Oklahoma.

On the 17th day of January 1995, the United States Marshals Service served a copy of the Complaint for Forfeiture In Rem, the Order, and the Warrant of Arrest and Notice In Rem of the defendant funds.

Billy Charles Jackson, Jr., and Donna Sheriff were determined to be the only potential claimants in this action with possible standing to file claims to the defendant funds. Billy Charles Jackson, Jr., executed a Stipulation for Forfeiture of the defendant funds, filed November 15, 1994, and Donna Sheriff executed a Disclaimer of Interest in the defendant funds, filed November 15, 1994.

USMS 285 reflecting the service upon the defendant funds is on file herein. It was determined that by virtue of the Stipulation for Forfeiture executed by Billy Charles Jackson, Jr., and the Disclaimer of Interest executed by Donna Sheriff it was not necessary to personally serve these individuals with Summons.

All persons or entities interested in the defendant funds were required to file their claims herein within ten (10) days after service upon them of the Warrant of Arrest and Notice In Rem, publication of the Notice of Arrest and Seizure, or actual notice of this action, whichever occurred first, and were

required to file their answer(s) to the Complaint within twenty (20) days after filing their respective claim(s).

No other persons or entities upon whom service was effected more than thirty (30) days ago have filed a Claim, Answer, or other response or defense herein.

The United States Marshals Service gave public notice of this action and arrest to all persons and entities by advertisement in The Tulsa Daily Commerce & Legal News, Tulsa, Oklahoma, a newspaper of general circulation in the Northern District of Oklahoma, the district in which the defendant funds were seized, on January 26, and February 2 and 9, 1995. Proof of Publication was filed February 27, 1995.

No other claims in respect to the $1,500 defendant funds have been filed with the Clerk of the Court, and no other persons or entities have plead or otherwise defended in this suit as to said defendant funds, and the time for presenting claims and answers, or other pleadings, has expired; and, therefore, default exists as to the $1,500 defendant funds, and all persons and/or entities interested therein, except Billy Charles Jackson, Jr., and Donna Sheriff, who have agreed to the forfeiture of the defendant funds by virtue of their Stipulation for Forfeiture and Disclaimer of Interest on file herein.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that the following-described defendant funds:

THE SUM OF ONE THOUSAND FIVE HUNDRED DOLLARS ($1,500.00),

be, and it hereby is, forfeited to the United States of America for disposition according to law.

Entered this 23rd day of March 1995.

S/ THOMAS R. BRETT

THOMAS R. BRETT, Chief Judge
United States District Court for the
Northern District of Oklahoma

SUBMITTED BY:

CATHERINE DEPEW HART
Assistant United States Attorney

N:\UDD\CHOOK\FC\JACKSON3\04471

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ERVIN HAWKINS,

Petitioner,

vs.

EDWARD L. EVANS, et al,

Defendants.

Case No. 94-C-178-B

O R D E R

DATE MAR 24 1995

On July 6, 1994, this Court entered its Order adopting and affirming the Magistrate Judge's Report and Recommendation, and denying Petitioner's request for a Writ of Habeas Corpus. Petitioner, on July 15, 1994, filed a Motion To Reconsider Order With Authorities (docket #15) and on October 6, 1994, filed a Motion For An Evidentiary Hearing (docket #16). The Court has for consideration these two motions.

In his pleadings Petitioner alleges the State failed to comply with the terms of a plea bargain agreement, and further alleges ineffective assistance of counsel in his attorney's failure to challenge the State's failure to comply with the terms of the plea agreement.

Petitioner pled guilty in 1986 to charges of three counts of First Degree Rape, one count of causing a Minor To Participate In Lewd Photographs and one count of Forcible Sodomy, stemming from

20

the alleged rape and sodomy of his 14-year-old stepdaughter. Pursuant to the guilty plea, Petitioner was sentenced to 30 years on each of the first four counts and 20 years on the sodomy count, all to run concurrently. Petitioner did not file a direct appeal.

In April, 1992, Petitioner filed a Petition For A Writ Of Habeas Corpus, Case No. 92-C-305-E, in this court. In his Petition Hawkins raised three issues: (1) Whether the trial court erred by not eliciting a factual basis for his guilty plea; (2) Ineffective assistance of counsel, and (3) Due Process violations during trial and post-trial proceedings. The Magistrate Judge, in his Report and Recommendation, recommended dismissing the Petition on procedural default grounds, i.e. failing to file a direct appeal in state court. The District Court adopted and affirmed the Magistrate Judge's Report and Recommendation and the matter was dismissed.

Somewhat the same scenario has transpired herein. Petitioner has filed a Petition For A Writ Of Habeas Corpus, on February 28, 1994. In his Petition Hawkins raised three issues: (1) Whether he has the right to file successive petitions; (2) Whether the state trial court violated Hawkins' due process rights during acceptance of his guilty plea, and (3) Whether the state trial court was biased and prejudiced toward Hawkins.

The Respondents herein, Edward L. Evans, et al, filed a Motion To Dismiss, alleging that Hawkins current Petition is successive and therefore subject to dismissal pursuant to Rule 9(b) of the Rules Governing Section 2254 Cases. The Magistrate Judge, concluding that Hawkins' issues in the current matter were indeed successive, recommended that the Petition be dismissed. This Court,

on July 6, 1994, after considered review of the record and the Magistrate Judge's recommendation, concluded that Hawkins' Petition is successive and that there was a prior determination on the merits. Accordingly, this Court adopted and affirmed the Report and Recommendation, denied Hawkins' request for a Writ of Habeas Corpus and dismissed the Petition.

The Court is somewhat perplexed in Hawkins' current position. Hawkins maintains that his state court plea bargain was violated[1] and his counsel was ineffective for not filing an appeal based on this allegation violation. From a reading of the partial state court transcript attached to Hawkins' Petition it appears that the state prosecutor did indeed recommend 20 years sentence on each count, to run concurrently, but that, by Hawkins' own admission, the state trial court refused to go along with such plea bargain, indicating clearly to Hawkins that if he chose to continue with his entry of a guilty plea the sentence would be thirty years on all counts except the sodomy count which was to be 20 years, the maximum. The following excerpts from the state trial transcript is noteworthy:

> "Q (By the Court) Sir, the important thing is for you to understand and know why you are appearing here today. I want to make it very clear to you, your attorney has indicated that to this charge, that is with these five Counts that is still remaining against you, you wish to enter a plea of guilty based on the fact and understanding that on such a plea, you are going to be sentenced to the State penitentiary for a period of thirty years. Do you understand that's what is happening here today?
> A Yes. I was told twenty. That is what I was told.

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[1] Hawkins claims the original recommendation of the prosecution was for a maximum of 20 years on each count, all to run concurrently.

> Q You were told twenty, sir, but the Court would not accept twenty and that is where it got to the thirty. Now, we are at thirty years and I want to make sure that you understand that if the Court accepts a plea of guilty, you are looking at term of thirty years in the State penitentiary. The Court is going to do this, sir, in line with the State's recommendation. I am going to run the sentences concurrently, which means you can serve them at the same time, but the sentence will be one for thirty years on each of these Counts excepting only for the fifth, which will be twenty years because that is the maximum, twenty years."

The state court thereafter advised Hawkins that he

> "must file any application to withdraw the plea of guilty within ten days from this date setting forth in detail the grounds for such withdrawal of the plea and requesting an evidentiary hearing in the trial court, and said trial court must hold said evidentiary hearing and deny said application within thirty days from the date of filing same. * * * Do you understand that?
> A Yes, sir."

The state court, after responding to Hawkins' query regarding "parole or anything?" by advising Hawkins that the Department of Corrections had control over those matters, offered the observation that "I am satisfied that you will be compelled to serve a large, very large part of that."

Additionally, the state court inquired of Hawkins' satisfaction with his counsel and received an affirmative reply.

The Court concludes that, based upon the record herein, it is unlikely that an evidentiary hearing would advance Petitioner's cause. The Court further concludes that Petitioner was indeed fairly treated by the state court in the matter of plea and sentencing.

The Court concludes Petitioner's Motion To Reconsider Order With Authorities (docket #15) and Motion For An Evidentiary Hearing (docket #16) should be and the same are hereby DENIED.

IT IS SO ORDERED this 23 day of March, 1995.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ULUS GUY JR,

Petitioner,

vs. No. 94-C-1073-B

RON CHAMPION,

Respondent.

ORDER

At issue before the Court in this habeas corpus action pursuant to 28 U.S.C. § 2254, is Respondent's motion to dismiss the petition as successive and abusive under Rule 9(b) of the Rules Governing Section 2254 cases. The Petitioner has objected to Respondent's motion and has filed numerous motions requesting a hearing on the merits, an order dismissing his state charges or granting him an acquittal, and an order compelling discovery. The Petitioner has also moved for appointment of counsel and for leave to amend the petition to allege a claim under Harris v. Champion, 15 F.3d 1538 (10th Cir. 1994).

I. BACKGROUND

Following a mistrial due to prosecutorial misconduct, a jury found Petitioner guilty of second-degree murder and the state court sentenced him to life in prison. Petitioner appealed, raising evidentiary issues, prosecutorial misconduct, and failure to declare a second mistrial. The Oklahoma Court of Criminal Appeals, however, rejected Petitioner's contentions and affirmed the

conviction. Guy v. State, 778 P.2d 470 (Okla. Crim. App. 1989). Petitioner then moved for post-conviction relief which the State Court denied. The Oklahoma Court of Criminal Appeals affirmed, finding Petitioner's claims procedurally barred. Thereafter, Petitioner filed a petition for a writ of habeas corpus in this Court, raising the following issue:

> I still need my first trial transcript that occurred April 8-9, 1985. It has the same information number CRF-84-4331 the first jury was discharged under this number, therefore the second trial under this number is illegal.

This Court denied relief, finding the claim procedurally barred. The Tenth Circuit Court of Appeals affirmed.

In the instant petition, Petitioner contends (1) that he has been tried twice for the same crime in violation of the Double Jeopardy Clause, and (2) that his counsel provided ineffective assistance of counsel when he failed to file a motion to dismiss charges because Petitioner was not selected from a live line-up and because he was tried twice for the same crime.

As noted above, the Respondents have moved to dismiss this second petition as successive and abusive. They argue that Petitioner's double jeopardy claim constitutes a successive claim as it was raised in the previous habeas petition and was dismissed as procedurally barred. As to the ineffective assistance of counsel claim, they argue that it could have been raised in the previous petition and therefore amounts to an abuse of the writ. Respondents further argue that Petitioner cannot show cause and prejudice or a fundamental miscarriage of justice.

Petitioner responds that he can show factual innocence because

he was not selected from the live line-up and because he was denied the transcript of the first mistrial.

II. ANALYSIS

The law regarding dismissal of successive section 2254 petitions is clear. Rule 9(b) states as follows:

> **Successive petitions.** A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

With regard to his successive claim (i.e., double jeopardy), the Petitioner bears the burden of showing that "'although the ground of the new application was determined against him on the merits on a prior application, the ends of justice would be served by a redetermination of the ground.'" Parks v. Reynolds, 958 F.2d 989, 994 (10th Cir. 1992) (quoting Sanders v. United States, 373 U.S. 1 (1963)), cert. denied, 112 S.Ct. 1310 (1992). In McClesky v. Zant, 499 U.S. 467, 495 (1991), the Supreme Court equated the "ends of justice" inquiry with the "fundamental miscarriage of justice" inquiry. See also Parks, 958 F.2d at 994.

The Supreme Court recently summarized its prior holdings involving a defendant's subsequent use of the habeas writ. In Herrera v. Collins, 113 S.Ct. 853, 862 (1993), the Court stated "that a petitioner otherwise subject to defenses of abusive or successive use of the writ may have his federal constitutional claim considered on the merits if he makes a proper showing of

actual innocence. This rule, or fundamental miscarriage of justice exception, is grounded in the 'equitable discretion' of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons." See also McClesky v. Zant, 499 U.S. 467, 495 (1991); Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986) (plurality opinion); Parks v. Reynolds, 958 F.2d at 995.

In the instant case, Petitioner has made no colorable showing of actual innocence which would justify reaching the merits of the successive claim raised in the present petition. Nor do Petitioner's claims that he was not selected from a live line-up and that one witness allegedly recanted his testimony suffice to meet that standard. Similarly, Petitioner's reliance on Harris v. Champion, 15 F.3d 1538 (10th Cir. 1994), is misplaced. In Harris, the Tenth Circuit Court of Appeals addressed whether inordinate delay in the filing and processing of a direct criminal appeal provides a sufficient ground to excuse exhaustion of state remedies. Therefore, the Court finds that Petitioner's double jeopardy claim should be dismissed as a successive claim under Rule 9(b).

With regard to Petitioner's new allegations that he was denied the ineffective assistance of counsel and that he was not selected from a live line-up, the Petitioner bears the burden of showing cause--e.g., that he was impeded from bringing the claims in the first petition by some objective factor external to the defense--as well as actual prejudice resulting from the errors of which he complains. See McCleskey v. Zant, 499 U.S. 467 (1991).

Here, Petitioner has not shown adequate cause or prejudice under the strict McCleskey standard. Nor has he met the narrow miscarriage of justice exception to the cause requirement, as he has not demonstrated that the alleged constitutional violation caused the conviction of an innocent man. Id. at 1475. Therefore, Petitioner's new claims must be dismissed as successive claims under Rule 9(b).

ACCORDINGLY, IT IS HEREBY ORDERED that:

(1) Respondent's motion to dismiss (doc. #6) is **granted**;

(2) Petitioner's motions for hearing, for order of dismissal, for judgment of acquittal, to compel production of transcripts, to amend habeas petition, and to appoint counsel (docs. #2, #4, #5, #9, and #11) are **denied**;

(3) Petitioner's application for a writ of habeas corpus is **dismissed** as a successive and abusive petition under Rule 9(b) of the Rules Governing Section 2254 cases.

SO ORDERED THIS 23rd day of Mar., 1995.

THOMAS R. BRETT, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ROBERT EARL GLASPER,

Petitioner,

vs.

R. DAN REYNOLDS,

Respondent.

No. 94-C-456-B

ORDER

Petitioner's pro-se application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is now at issue before the Court. Petitioner alleges that the state court violated his constitutional rights when it failed to establish a factual basis for his guilty plea and failed to abide by its "representation" that Petitioner could withdraw his guilty plea within the prescribed time. Petitioner also alleges ineffective assistance of counsel. The Respondent has objected to Petitioner's application to which the Petitioner has filed a reply and a supplemental reply. The Petitioner has also moved for an evidentiary hearing, to expand the record, and for ruling. As more fully set out below, the Court concludes that the petition for a writ of habeas corpus and Petitioner's motions should be denied.

I. BACKGROUND

In 1991, Petitioner was charged in the district Court of Tulsa County with (1) Attempted Robbery by Force (County I), and Robbery by Force (Count II), After Former Conviction of Two or More

Felonies, in Case No. CF-91-2288; (2) Robbery by Force, After Former Conviction of Two or More Felonies, in Case No. CF-91-2468; and (3) Robbery by Fear, After Former Conviction of Two or More Felonies, Case No. CF-91-3059. The cases were consolidated and on October 22, 1991, Petitioner pled guilty in each of the cases. The Court sentenced petitioner in accordance with the plea agreement to forty years on each charge, with the sentences to run concurrently. On October 30, 1991, Petitioner filed a pro se motion to withdraw his guilty plea which the trial court denied on November 26, 1991. Petitioner timely appealed, alleging (1) the trial court failed to properly inform Petitioner of the procedure to withdraw a guilty plea; (2) the trial court failed to establish a factual basis for the plea of guilty; (3) Petitioner was denied effective assistance of counsel; and (4) Petitioner was denied copies of documents needed to present a defense to the jury. The Oklahoma Court of Criminal Appeals affirmed the denial of Petitioner's motion to withdraw his guilty plea in an unpublished opinion. Glasper v. State, No. C-92-90 (Okla. Crim. App. April 22, 1992).

Thereafter Petitioner moved for post-conviction relief in the District Court of Tulsa County. He again alleged that the court accepted his plea of guilty without establishing a factual basis for the plea and without ensuring that he knowingly and voluntarily waived his rights. Petitioner further alleged that he was denied the right to effective assistance of counsel during the proceedings to withdraw his guilty plea and on direct appeal. The State court denied post-conviction relief, concluding that the arguments either

were, or could have been, addressed on direct appeal from the denial of Petitioner's motion to withdraw guilty plea, and therefore were procedurally barred. The Oklahoma Court of Criminal Appeals affirmed.

In the present petition for a writ of habeas corpus, Petitioner alleges once again (1) that the trial court failed to establish a factual basis for his guilty plea: (2) that the trial court failed to properly advise Petitioner to withdraw the plea of guilty; and (3) that his counsel provided ineffective assistance under the Sixth Amendment. In support of his third ground for relief, Petitioner cites Baker v. Kaiser, 929 F.2d 1495 (10th Cir. 1991), and requests "this court to remand this case to the sentencing court for further findings of fact and conclusions of law." (Doc. #1.)

In their Rule 5 Response, Respondents contend that Petitioner has failed to make a substantial showing of a denial of a federal right. They argue that the validity of a guilty plea is a matter of state law and that Petitioner has made only broad allegations of ineffective assistance of counsel.

Petitioner replies he has a constitutional right to withdraw his guilty plea and challenge the indictment by way of a jury trial. He also alleges that his plea did not comply with Okla. Stat. tit. 22, § 516 and that he was entitled to the effective assistance of counsel during the ten days following the entry of the judgment and sentence in order to withdraw his guilty plea as set out in Baker, 929 F.2d 1495. In his amended reply, Petitioner

again alleges that his guilty plea was involuntary because the alleged right to withdraw his guilty plea within ten days was meaningless.

II. ANALYSIS

As a preliminary matter, the Court must determine whether Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). See Rose v. Lundy, 455 U.S. 509 (1982). Exhaustion of a federal claim may be accomplished by either (a) showing the state's appellate court had an opportunity to rule on the same claim presented in federal court, or (b) that at the time he filed his federal petition, he had no available means for pursuing a review of his conviction in state court. White v. Meachum, 838 F.2d 1137, 1138 (10th Cir. 1988); see also Wallace v. Duckworth, 778 F.2d 1215, 1219 (7th Cir. 1985); Davis v. Wyrick, 766 F.2d 1197, 1204 (8th Cir. 1985), cert. denied, 475 U.S. 1020 (1986). Respondent concedes, and this Court finds, that the Petitioner meets the exhaustion requirements under the law.

The Court also finds that an evidentiary hearing is not necessary as the issues can be resolved on the basis of the record, see Townsend v. Sain, 372 U.S. 293, 318 (1963), overruled in part by Keeney v. Tamayo-Reyes, 112 S. Ct. 1715 (1992). The granting of such a hearing is within the discretion of the court, and this Court finds that a hearing is not necessary.

A. Voluntariness of the Guilty Plea

A defendant who has pled guilty, like the Petitioner in this case, waives all non-jurisdictional challenges to his conviction and may thereafter challenge on a petition for a writ of habeas corpus only the voluntary and intelligent nature of his plea. United States v. Wright, 43 F.3d 491, 494 (10th Cir. 1994). In the instant petition, Petitioner attempts to challenge the voluntary nature of his plea by arguing that the state court failed to ensure that there was a factual basis for his plea and failed to abide by its "representation" that Petitioner could indeed withdraw his guilty plea within ten days. (Petitioner's Supplemental Reply, doc. #12.)

Petitioner's contention that the state court lacked a factual basis for the plea does not present an independent ground for invalidating the plea in this habeas corpus action. The lack of a factual basis for a state plea is not a federal constitutional claim, see Sena v. Roberto, 617 F.2d 579, 581 (10th Cir. 1980); Freeman v. Page, 443 F.2d 493, 495 (10th Cir.), cert. denied, 404 U.S. 1001 (1971), and therefore, it is not cognizable in this habeas corpus action. Herrera v. Collins, 113 S.Ct. 853, 861 (1993) (habeas jurisdiction is dependent only on a federal constitutional violation); Estelle v. McGuire, 502 U.S. 62, 67 (1991) (same). Nor was Petitioner's plea accompanied with statements of innocence, which might require an inquiry into the factual basis for his plea. See North Carolina v. Alford, 400 U.S. 25, 38 n.10 (1970); Banks v. McGougan, 717 F.2d 186, 188 (5th Cir.

1983). To the contrary, the record in this case indicates that Petitioner at no time actually claimed his innocence.

Petitioner's claim that the trial court misrepresented that he could withdraw his plea within ten days fares no better. The state court at no time led Petitioner to believe that he could withdraw his guilty plea within ten days after the entry of the judgment and sentence if he simply changed his mind. On the contrary, the state court repeatedly ascertained that Petitioner's plea was intelligently and voluntarily entered and that he would not change his mind after the hearing. In this regard the Court stated as follows:

> THE COURT: Now Mr. Glasper, I take pleas almost every day from people who are being sentenced to serve time and I go through basically the same questions with them as I have with you here today, primarily I'm trying to make sure that pleas of guilty are entered voluntarily. Is your plea entered voluntarily here today?
>
> MR. GLASPER: Yes, sir.
>
> THE COURT: Sometimes, I'm surprised after I take pleas of guilty, and sentence people to serve time, that in some cases I get back later motions or appeal papers from those people saying things like why Judge I've changed my mind, [I] never was guilty in the first place, somebody talked me into doing that, somebody promised me something that I didn't receive, this sort of thing. Anything like that going on with you here today, Mr. Glasper?
>
> MR. GLASPER: No, sir.

(Plea and Sentencing Transcript at 11-12.)

Even assuming the state court failed to notify Petitioner of his right to appeal his guilty plea, this Court concludes that Petitioner would not be entitled to habeas relief on this ground. It is well established that a state court is not constitutionally

required to inform a petitioner of his right to appeal a guilty plea. Woolridge v. Kaiser, 937 F.2d 617, 1991 WL 132438 *2 (10th Cir. 1991) (No. 91-6027) (unpublished opinion) (holding that trial court's failure to inform petitioner of his right to appeal a plea of guilty did not state a claim for habeas relief); see also Barber v. United States, 427 F.2d 70, 71 (10th Cir.), cert. denied, 400 U.S. 867 (1970); Crow v. United States, 397 F.2d 284, 285 (10th Cir. 1968). In fact by pleading guilty a defendant indicates that he wishes to waive his appellate right. Laycock v. State of New Mexico, 880 F.2d 1184, 1188 (10th Cir. 1989).

Therefore, Petitioner is not entitled to habeas relief on the basis of his first ground of error.

B. Ineffective Assistance of Counsel

In support of his claim of ineffective assistance of counsel, Petitioner alleges that his counsel failed to help Petitioner file a motion to withdraw his guilty plea during the ten-day period following the entry of the Judgement and Sentence as set out in Baker v. Kaiser, 929 F.2d 1495 (10th Cir. 1991).[1]

To establish ineffective assistance of counsel, a petitioner must show that his counsel's performance was deficient and that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687 (1984); Osborn v. Shillinger, 997

[1]Although the petition does not allege any specific ground of ineffective assistance of counsel, the Court has relied on the reply and supplemental reply to understand the essence of Petitioner's ineffective assistance claim.

F.2d 1324, 1328 (10th Cir. 1993). A petitioner can establish the first prong by showing that counsel performed below the level expected from a reasonably competent attorney in criminal cases. Strickland, 466 U.S. at 687-88. To establish the second prong, a petitioner who has pled guilty must show a reasonable probability that without counsel's errors, he would not have pled guilty and would have insisted on proceeding to trial. Hill v. Lockhart, 474 U.S. 52 (1985).

Petitioner's reliance on Baker, 929 F.2d 1495, is misplaced. Unlike Baker, Petitioner's conviction was obtained following a guilty plea. As a result, Petitioner's appointed counsel had no absolute duty to file a motion to withdraw the guilty plea or advise Petitioner whether he had meritorious grounds to withdraw his guilty plea. Only "if a claim of error is made on constitutional grounds, which could result in setting aside the plea, or if the defendant inquires about an appeal right," counsel has a duty to inform the defendant of his limited right to appeal a guilty plea. Laycock, 880 F.2d at 1188; see also Shaw v. Cody, ___ F.3d ___, No. 94-6172, 1995 WL 20425, *2 (10th Cir. Jan. 20, 1995) (unpublished opinion). In this case, the record reveals that Petitioner was fully advised of his right to appeal at the time of sentencing and therefore Petitioner cannot establish any factual basis for his ineffectiveness claim.[2]

[2]The Court finds this case distinguishable from Randall v. State, 861 P.2d 314 (Okla. Crim. App. 1993), where the Oklahoma Court of Criminal Appeals held that a hearing on an application to withdraw a guilty plea is a "critical stage" which invokes a defendant's constitutional right to counsel.

III. CONCLUSION

After carefully reviewing the record in this case, the Court concludes that the Petitioner has not established that he is in custody in violation of the Constitution or laws of the United States. **ACCORDINGLY, IT IS HEREBY ORDERED that:**

(1) The petition for a writ of habeas corpus is **denied**;

(2) Petitioner's motions for hearing and to expand the record (docs. #11 and #13) are **denied**; and

(3) Petitioner's motion for ruling (doc. #14) is **granted**.

SO ORDERED THIS 23rd day of March, 1995.

THOMAS R. BRETT, Chief Judge
UNITED STATES DISTRICT COURT

F 3-17-95

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LOCAL AMERICA BANK OF TULSA, a federal savings bank,

Plaintiff,

vs.

DON E. GASAWAY, et al.

Defendants.

Case No. 91-C-148-E

AGREED ORDER CLARIFYING JUDGMENT

This matter comes on for consideration before the Court on the Motion for Leave to Enter Deficiency Judgment filed by The Federal Deposit Insurance Corporation, in its corporate capacity, as Receiver for Bank of Commerce & Trust Company, Tulsa, Oklahoma ("FDIC"). The FDIC and Defendants, Don E. Gasaway a/k/a Donald E. Gasaway and Georgeann Gasaway a/k/a Georgeann S. Gasaway (collectively, the "Gasaways") have agreed to the entry of this judgment in lieu of litigating the FDIC's Motion for Deficiency Judgment and to clarify the judgment described below currently outstanding in favor of the FDIC against the Gasaways.

The FDIC and the Gasaways agree, and the Court finds, as follows:

1. An Agreed Journal Entry of Judgment and Decree of Foreclosure (the "Journal Entry") was filed August 11, 1992 in the above-entitled cause in favor of the FDIC, against Gasaways, jointly and severally, in the principal amount of $258,520.07, together with accrued interest through March 13, 1991, of $231,445.12, with interest

accruing after March 13, 1991 in the per diem amount of $129.26, along with all costs and expenses of that action and all costs and expenses incurred in preserving and protecting the Property (as defined in the Journal Entry), including a reasonable attorneys' fee as described therein, and all abstracting and title commitment expenses with post-judgment interest thereon at the legal rate.

2. The Journal Entry further granted judgment in favor of Local America Bank of Tulsa ("Local America") against Gasaways, jointly and severally, in the principal amount of $33,824.95, with interest at the rate of 8.75% per annum, from June 1, 1990, until paid, plus judgment for abstracting costs of $933.00, plus judgment for $2,210.51 in late charges, plus judgment for escrow deficiency of $3,995.78, and judgment in the principal amount of $12,054.93, with interest at the rate of 11.04% per annum from April 20, 1990, until paid, plus judgment for $110.00 in late charges, plus judgment for attorneys' fees in the amount of $10,400.83, all to bear interest at the statutory rate from the date of judgment until paid, resulting in a total judgment in favor of Local America in the amount of $73,807.73 as of November 17, 1992 ("Local America's First Lien Judgment").

3. On or about November 18, 1992, Local America assigned the judgment described immediately above to the FDIC and the FDIC is the holder of that judgment as of the date hereof.

4. The Journal Entry provides that certain amounts of the judgment are secured by mortgages and certain other amounts are unsecured. A detailed accounting of the secured and unsecured portions of the FDIC's judgment, including the amounts

assigned by Local America to the FDIC, is set forth on the attached Exhibit "A". According to the terms of the Journal Entry, the FDIC holds a total judgment against Gasaways (not including Local America's First Lien Judgment), as of November 17, 1992, in the amount of $562,025.55 (the "FDIC's Total Judgment"). Part of the FDIC's Total Judgment was secured by a second lien on the Property in favor of the FDIC in the amount of $154,234.61 as of November 17, 1992 (the "FDIC's Second Lien Judgment"). Another part of the FDIC's total judgment was secured by a third lien on the Property in favor of the FDIC in the amount of $51,380.21 as of November 17, 1992. (the "FDIC's Third Lien Judgment). Local America's First Lien Judgment was secured by a first lien on the Property.

5. The remaining portion of the FDIC's Total Judgment was not secured. That remaining portion can be calculated by subtracting the FDIC's Second Lien Judgment and the FDIC's Third Lien Judgment from the FDIC's Total Judgment, resulting in a total unsecured judgment in favor of the FDIC against Gasaways in the amount of $356,410.73 as of November 17, 1992, as shown on the attached Exhibit "A". Adding interest at the rate of 3.51% (the Judgment rate) from November 17, 1992 to August 1, 1994 (in the amount of $21,267.03), results in a total unsecured judgment as of August 1, 1994 in favor of the FDIC against Gasaways in the amount of $377,677.76 (the "FDIC's Total Unsecured Judgment").

6. On August 5, 1994, the FDIC filed its Motion for Leave to Enter Deficiency Judgment, pursuant to 12 Okla. Stat. §686, seeking a deficiency judgment (in addition to the amount of the FDIC's Total Unsecured Judgment), in the amount of $115,951.79, as

of August 1, 1994, calculated as set forth on the attached Exhibit "A". This deficiency judgment amount represented the amount of the FDIC's secured judgment, as set forth in the Journal Entry, less the sale price of the Property which secured the indebtedness represented by that secured judgment.

7. On August 25, 1994, Don E. Gasaway filed a Response to Motion for Leave to Enter Deficiency Judgment, requesting that the Court overrule the FDIC's Motion for Deficiency Judgment or set a scheduling conference and set the matter for hearing.

8. In lieu of litigating the deficiency judgment issues, the FDIC and the Gasaways have agreed to settle the deficiency judgment issues and to clarify the current judgment in favor of the FDIC against Gasaways. The FDIC and Gasaways have agreed that the FDIC will waive the $115,951.79 portion of the deficiency judgment set forth immediately above as requested in the FDIC's Motion for Leave to Enter Deficiency Judgment. In exchange for that waiver, the Gasaways have agreed to the entry of this Agreed Order Clarifying Judgment in order to clarify the remaining judgment currently outstanding in favor of the FDIC against Gasaways.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that this Agreed Order Clarifying Judgment continues and clarifies the unsecured judgment against Don E. Gasaway a/k/a Donald E. Gasaway and Georgeann Gasaway a/k/a Georgeann S. Gasaway, jointly and severally originally entered by this Court in favor of the FDIC in the amount of $377,677.76 as of August 1, 1994, plus interest thereafter at the judgment rate, plus all attorney's fees incurred herein, pursuant to the terms of the Agreed Journal Entry of Judgment and Decree of Foreclosure filed herein August 11, 1992.

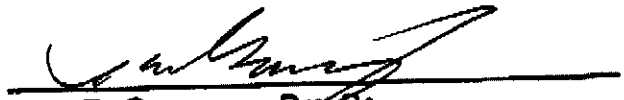
IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the FDIC waives its right to an additional deficiency judgment in the amount of $115,951.79 as requested by the FDIC in its Motion for Leave to Enter Deficiency Judgment filed August 5, 1994.

JAMES O. ELLISON
JUDGE OF THE DISTRICT COURT

APPROVED:

Jeffrey D. Hassell, OBA #12325
Stephen W. Lake, OBA #14766
2000 Bank IV Center
Tulsa, Oklahoma 74119
(918) 582-9201

ATTORNEYS FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION, IN ITS CORPORATE CAPACITY, AS RECEIVER FOR BANK OF COMMERCE AND TRUST COMPANY, TULSA, OKLAHOMA



Don E. Gasaway, Pro Se
P.O. Box 14070
Tulsa, OK 74159

EXHIBIT "A"

FDIC'S TOTAL JUDGMENT	
$258,520.07	Principal amount
+ $231,445.12	Interest to 3/13/91 as set forth in the 8/11/92 Judgment
+ $ 66,827.42	Interest from 3/13/91 to 8/11/92 (date of Judgment) = 517 days @ $129.26/day = $66,827.42
= $556,792.61	Judgment amount as of 8/11/92 (date of Judgment)
+ $ 5,232.94	Interest @ 3.51% (Judgment rate) from 8/11/92 to 11/17/92 (date of Marshal's Sale)
$562,025.55	**TOTAL JUDGMENT AS OF 11/17/92** (not including Local America's First Lien Judgment)

LOCAL AMERICA'S FIRST LIEN JUDGMENT (Assigned to FDIC)	
$33,824.95	Principal amount under Note I
+ $ 6,504.22	Interest @ $8.11/day from 6/1/90 to 8/11/92 = 802 days @ $8.11/day = $6,504.22
+ $ 933.00	Abstracting costs
+ $ 2,210.51	Late charges
+ $ 3,995.78	Escrow deficiency
+ $12,054.93	Principal amount under Note II
+ $ 3,080.60	Interest @ $3.65/day from 4/20/90 to 8/11/92 = 844 days @ $3.65/day = $3,080.60
+ $ 110.00	Late charges
+ $10,400.83	Attorneys' fees
= $73,114.82	Total as of 8/11/92 (date of Judgment)
+ $ 692.91	Interest @ 3.51% (Judgment rate) from 8/11/92 to 11/17/92 (date of Marshal's Sale)
$73,807.73	**TOTAL LOCAL AMERICA'S FIRST LIEN JUDGMENT AS OF 11/17/92**

FDIC'S SECOND LIEN JUDGMENT	
$39,162.87	Principal amount of FDIC Note I
+ $41,730.04	Principal amount of FDIC Note II
+ $65,378.90	Principal amount of FDIC Note III
= $146,271.81	Total principal on FDIC Notes I, II and III (second lien position)
+ $ 6,526.74	Interest on FDIC Notes I, II and III ($6.60 + $7.92 + $12.45 = $26.97/day; **$26.97** from 12/31/91 to 8/11/92 = $6,526.74
$152,798.55	Total of FDIC's Second Judgment Lien as of 8/11/92 (date of Judgment)
+$ 1,436.06	Interest @ **3.51%** (Judgment rate) from 8/11/92 to 11/17/92 (date of Marshal's Sale)
$154,234.61	**FDIC'S TOTAL SECOND LIEN JUDGMENT AS OF 11/17/92**

FDIC'S THIRD LIEN JUDGMENT	
$ 5,199.21	Principal amount of FDIC's Note IV
+ $37,366.86	Principal amount of FDIC's Note I (from FDIC Note 1A)
+ $ 6,089.99	Principal amount of FDIC's Note II (from FDIC Note 1A)
$48,656.06	Total of FDIC Notes IV, I and II (from Note 1A) (third lien position)
+ $ 2,245.76	Interest on above described notes ($1.03 + $7.09 + $1.16 per day) = **$9.28/day** from 12/31/91 to 8/11/92 = $2,245.76
$50,901.82	Total of FDIC's Third Judgment Lien as of 8/11/92
+ $ 478.39	Interest @ **3.51%** (Judgment rate) from 8/11/92 to 11/17/92 (date of Marshal's Sale)
$51,380.21	**FDIC'S TOTAL THIRD LIEN JUDGMENT AS OF 11/17/92**

FDIC'S DEFICIENCY JUDGMENT (In addition to FDIC's Total Unsecured Judgment)	
$ 73,807.73	Local America's First Lien Judgment as of 11/17/92 (assigned to FDIC)
+ $154,234.61	FDIC's Second Lien Judgment as of 11/17/92
+ $ 51,380.21	FDIC's Third Lien Judgment as of 11/17/92
= $279,422.55	FDIC's Total Secured Judgments + Local America's Secured Judgments as of 11/17/92
- $170,000.00	Sale Price of Property at Marshal's Sale on 11/17/92 and fair market value of the subject property on that date
= $109,422.55	Deficiency Judgment Amount as of 11/17/92
+ $ 6,529.24	Interest from 11/17/92 to 8/1/94 at 3.51% Judgment rate
= $115,951.79	**DEFICIENCY JUDGMENT AS OF 8/1/94**

FDIC'S TOTAL UNSECURED JUDGMENT	
$562,025.55	FDIC's Total Judgment as of 11/17/92 (not including Local America's Secured Judgment)
- $154,234.61	FDIC's Second Lien Judgment as of 11/17/92
- $ 51,380.21	FDIC's Third Lien Judgment as of 11/17/92
= $356,410.73	FDIC's Unsecured Judgment as of 11/17/92
+ $ 21,267.03	3.51% Interest (Judgment rate) from 11/17/92 to 8/1/94
$377,677.76	**FDIC's TOTAL UNSECURED JUDGMENT AS OF 8/1/94**

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

HOMEWARD BOUND, INC. et al.,	)	
Plaintiffs,	)	
vs.	)	**Case No. 85-C-437-E**
THE HISSOM MEMORIAL CENTER, et. al.,	)	
Defendants.	)	

ORDER

This matter comes on for consideration of the rules that are to govern the supported living home of Rex Reid, a classmember in this action. The Court having reviewed this program and being advised of the needs, enters the following order:

1. BIOS and any other provider providing residential services to Rex Reid shall have **male staff in his house at all times** that Rex is present.

2. BIOS shall expedite establishing the residential program with Jill Whited.

A copy of this order shall be kept in Rex Reid's residence at all time.

IT IS SO ORDERED.

HONORABLE JAMES O. ELLISON, CHIEF
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

HOMEWARD BOUND, INC. et al.,	)	
Plaintiffs,	)	
v.	)	**Case No. 85-C-437-E**
THE HISSOM MEMORIAL CENTER, et. al.,	)	
Defendants.	)	

ORDER & JUDGMENT

Plaintiffs' counsel, Bullock & Bullock, filed an Attorney Fee Application on February 9, 1995 for an award of attorney fees and expenses in accordance with the December 23, 1989 order and stipulation of the parties.

The Court has reviewed the application for fees and approves the Stipulation of the parties.

The Court hereby award the firm Bullock & Bullock uncontested attorney fees in the amount of $ 48,966.25 and out-of-pocket expenses in the amount of $ 4,228.14.

IT IS THEREFORE ORDERED that the Department of Human Services shall pay Plaintiffs' counsel, Bullock & Bullock, attorney fees in the amount of $ 48,966.25 plus expenses in the amount of $ 4,228.14, and a judgment in the amount of $ 53,194.39 is hereby entered on this day.

ORDERED this 23rd day of March, 1995.

JAMES O. ELLISON
United States District Court

Louis W. Bullock
Patricia W. Bullock
BULLOCK & BULLOCK
320 South Boston
Suite 718
Tulsa, Oklahoma 74103-3708
(918) 584-2001

Frank Laski
Judith Gran
PUBLIC INTEREST LAW CENTER OF PHILADELPHIA
125 South Ninth Street
Suite 700
Philadelphia, Pennsylvania 19107
(215) 627-7000

ATTORNEYS FOR PLAINTIFFS

Mark Jones
Assistant Attorney General
OFFICE OF THE ATTORNEY GENERAL
4545 North Lincoln, Suite 260
Oklahoma City, Oklahoma 73105-3498
(405) 521-4274

ATTORNEY FOR DEFENDANTS

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

KELLY JO BEARD, et al.,)
)
Plaintiff,)
)
v.) 87-C-704-E
)
THE HISSOM MEMORIAL CENTER,)
)
Defendant.)

ORDER

The court has reviewed the request for compensatory education funding for Hissom class member Stephen Parsons, submitted under cover of Compliance Officer Janice West's letter of March 13, 1995 (attached).

The court hereby approves the request for compensatory education funding for Mr. Parsons in the amount of $9,000.00. Under the provision of the Beard settlement agreement, the compensatory education fund is the proper funding source for these services and the Tulsa Public Schools are hereby authorized to pay up to $9,000.00 in claims for services provided to Stephen Parsons pursuant to his compensatory education plan (which includes his Personal Futures Plan). This expenditure may be made from the flowthrough funds previously transferred to the Tulsa Public Schools pursuant to this court's Order Directing Administrative Transfer of Compensatory Education Funds, filed January 6, 1995.

Claims for services and expenses pursuant to a court-approved compensatory education plan must first be presented and approved by the Compliance Officer, who will then forward them to the Tulsa Public Schools for "flowthrough" administration and payment directly to the provider, or, where appropriate, to reimburse expenditures from the "enhancement budget line item" of the Compliance Office, where such expenditures are

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shown to have been expressly approved by Magistrate Judge Wagner. All expenditures by the Tulsa Public Schools pursuant to this Order are to be in compliance with all appropriate and applicable state and Tulsa Public School District auditing guidelines, procedures and regulations.

Dated this 22nd day of March, 1995.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

LEONARD RENAL ROBERTS,

Plaintiff,

v.

STANLEY GLANZ,

Defendant.

Case No: 92-C-497-H

REPORT AND RECOMMENDATION OF U. S. MAGISTRATE JUDGE

This report and recommendation pertains to Defendant's Combined Motion to Dismiss or in the Alternative Motion to Stay Proceedings (Docket #29)[1], Defendant's Motion for Summary Judgment (Docket #40), Plaintiff's Traverse to Defendant's Motion for Summary Judgment (Docket #43), Defendant's Objection to Plaintiff's Response Filed Ten Days Out of Time (Docket #44), and Defendant's Reply to Plaintiff's Response to Defendant's Motion for Summary Judgment (Docket #45).

Plaintiff is an inmate of the Oklahoma Department of Corrections serving a seventy-five year sentence for larceny of merchandise from a retailer after former conviction of two or more felonies. Prior to his conviction, he was incarcerated in the Tulsa City-County Jail ("jail") from April 23, 1992 until June 26, 1992. This lawsuit concerns his stay in the jail during this period when he claims he was denied exercise privileges, was served food prepared in unsanitary kitchen facilities, was denied access to the courts, and did not receive proper medical care.

Defendant's Combined Motion to Dismiss or in the Alternative Motion to Stay

[1] "Docket numbers" refer to numerical designations assigned sequentially to each pleading, motion, order, or other filing and are included for purposes of record keeping only. "Docket numbers" have no independent legal significance and are to be used in conjunction with the docket sheet prepared and maintained by the United States Court Clerk, Northern District of Oklahoma.

Proceedings (Docket #29) should be denied. Defendant's motion is based on plaintiff's failure to comply with this court's discovery deadlines. However, plaintiff participated in his deposition and provided a list of his witnesses and copies of his exhibits on May 26, 1994 (Ex. "C" to Defendant's Brief in Support of Defendant's Motion for Summary Judgment ("Defendant's Brief"), (Docket #41), pgs. 7-8). Plaintiff's cooperation in discovery precludes the dismissal or a stay of this suit. "[T]he plain language of Rule 56(c) [Fed.R.Civ.P.] mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp v. Catrett, 477 U.S. 317, 322 (1986). If there is a complete failure of proof concerning an essential element of the non-movant's case, there can be no genuine issue of material fact because all other facts are necessarily rendered immaterial. Id. at 323.[2]

DENIAL OF EXERCISE PRIVILEGES

Plaintiff claims in his amended complaint (Docket #4) that he was denied exercise privileges during his incarceration in the jail. Defendant admits that plaintiff was denied

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[2] A party opposing a properly supported motion for summary judgment may not rest upon mere allegation or denials of his pleading, but must affirmatively prove specific facts showing that there is a genuine issue of material fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). The Court stated that "the mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Id. at 252.

The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts". Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585 (1986).

The record must be construed liberally in favor of the party opposing the summary judgment, but "conclusory allegations by the party opposing ... are not sufficient to establish an issue of fact and defeat the motion." McKibben v. Chubb, 840 F.2d 1525, 1528 (10th Cir. 1988). The Tenth Circuit requires "more than pure speculation to defeat a motion for summary judgment" under the standards set by Celotex and Anderson. Setliff v. Memorial Hospital of Sheridan County, 850 F.2d 1384 (10th Cir. 1988).

such privileges, but argues that this deprivation did not violate his rights as a matter of law.

During the time plaintiff was incarcerated he was considered a high escape risk because he had a "hold" from the Oklahoma Department of Corrections. (Defendant's Brief, Exhibit "A" - Affidavit of Tulsa County Sheriff Investigator, Tony Boutwell). Jail policy prohibits high escape risk inmates from participating in the exercise program. (Ex. "B" to Defendant's Brief - Tulsa County Jail Policy for High Escape Risk Inmates).

The courts have held that a deprivation of exercise may constitute an impairment of health and rise to the level of an Eighth Amendment violation in certain circumstances. In Ruiz v. Estelle, 679 F.2d 1115, 1151-52 (5th Cir. 1982), cert. denied, 460 U.S. 1042 (1983), the court observed that "confinement of inmates for long periods of time without opportunity for regular physical exercise constitutes cruel and unusual punishment." Id. at 1152. The Ruiz court refused, however, to find that deprivation of exercise was per se unconstitutional. When determining an inmate's need for regular exercise, it looked to the particular facts of each case.

In the case at bar, plaintiff was only incarcerated in the jail for two months, so he was not deprived of exercise for "long periods of time." In addition, the denial of his right to exercise was based on his status as an escape risk under prison regulations. In Turner v. Safley, 482 U.S. 78, 89 (1987), the Supreme Court concluded that, if a prison regulation impinges on an inmate's constitutional rights, the regulation is valid if it is "reasonably related to legitimate penological interests." Defendant's policy of prohibiting high-escape risk inmates, such as plaintiff, from participating in the jail's exercise program is reasonably

related to a legitimate penological interest in minimizing the opportunity for plaintiff to escape and does not violate plaintiff's due process rights. The court in Martin v. Tyson, 845 F.2d 1451, 1457 (7th Cir.), cert. denied, 488 U.S. 863 (1988), concluded that denial of outdoors exercise was related to legitimate prison concern in security, based on an escape charge pending against detainee, and thus was not a constitutional deprivation. In Clayton v. Thurman, No. 79-C-723-B, this court determined that an exercise program in which inmates incarcerated for more than thirty days would be eligible to exercise, unless classified as an escape risk or having suspended exercise privileges, did not violate the inmates' constitutional rights.

Defendant's Motion for Summary Judgment (Docket #40) should be granted as to plaintiff's claim that he was not permitted to exercise while at the jail.

UNSANITARY KITCHEN PROCEDURES

Plaintiff also claims that several inmates at the jail suffered food poisoning due to the unsanitary kitchen procedures at the jail, that hair and insects are often found in food, that the food is cold and greasy, and that inmates serving food have not been tested for transmittable disease. Plaintiff cannot bring a § 1983 action on behalf of other prisoners. Martin v. Sargent, 780 F.2d 1334, 1337 (8th Cir. 1985). In order to prevail on these claims as they relate to him, he must be able to prove that he sustained actual damage as a result of the kitchen procedures. Plaintiff was asked at his deposition whether he sustained any injuries from eating the food in the jail and he stated that the cold food bothered an ulcer he already had before he was incarcerated. (Ex. "C" to Defendant's Brief, pg. 64). He admitted that he got sick "several times" at the jail but he didn't know "if it

was food poisoning or what it was." (Ex. "C" to Defendant's Brief, p. 66).

It is clear that he has no evidence that he suffered any injury from the alleged unsanitary kitchen facilities. He has listed no medical personnel as witnesses to testify that the food he ate in the county jail caused illness or a bleeding ulcer. Since plaintiff cannot prove a causal connection between the alleged constitutional violations and any physical problems he may have, he cannot prevail in his § 1983 action. Benson v. Cady, 761 F.2d 335, 339 (7th Cir. 1985). Defendant's Motion for Summary Judgment (Docket #40) should be granted as to the claims relating to food.

DENIAL OF MEDICAL CARE

Plaintiff claims that he did not receive adequate medical attention while incarcerated. He stated at his deposition that he only saw nurses for his stomach complaints, never a doctor (Ex. "C" to Defendant's Brief, pg. 68). He contends he received improper medications, since "Motrin is really, really detrimental to an ulcer." (Ex. "C" to Defendant's Brief, pg. 70).

As to plaintiff's claim that he was denied medical care, the Supreme Court established the legal standard for the review of such claims in Estelle v. Gamble, 429 U.S. 97 (1976). It stated that "deliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain." Id. at 104. While the deliberate indifference standard applies to prison doctors in their handling of a prisoner's needs, as well as to prison officials, the failure to provide adequate medical care must be intentional, not merely inadvertent. Id. at 104-105. In this circuit, the test is satisfied when an inmate is prevented from receiving the recommended care, or is refused access

to medical staff competent to evaluate the need for treatment. Garcia v. Salt Lake Community Action Program, 768 F.2d 303, 307-308 fn. 3 (10th Cir. 1985).

Plaintiff's belief that he needed additional medication, other than that prescribed by the treating physician, as well as his contention that he was denied treatment by a doctor, is insufficient to establish a constitutional violation. Estelle, 429 U.S. at 107 ("matter[s] of medical judgment" do not give rise to § 1983 claim); Ledoux v. Davies, 961 F.2d 1536 (10th Cir. 1992); Ramos v. Lamm, 639 F.2d 559, 575 (10th Cir. 1980) (difference of opinion between inmate and prison medical staff regarding treatment or diagnosis does not itself state a constitutional violation), cert. denied, 450 U.S. 1041 (1981).

Plaintiff has failed to show deliberate indifference by prison personnel to his medical problem. He admitted he was seen by a prison nurse several times while incarcerated and received Maalox and Motrin (Ex. "C" to Defendant's Brief, pgs. 69-74). Defendant's Motion for Summary Judgment (Docket #40) should be granted as to his claim that he received inadequate medical care.

DENIAL OF ACCESS TO COURT

As to plaintiff's claim that he was denied access to the court, he admitted in his deposition that he did not remember ever alleging that he was denied access to the courts during his jury trial and that he was no longer alleging that he was denied access to the court during the trial. (Ex. "C" to Defendant's Brief, pgs. 39-40). Defendant's Motion for Summary Judgment (Docket #40) should be granted as to claimant's contention he was denied access during trial.

Plaintiff also asserts that he was denied access to the courts prior to his jury trial

because he tried to file a Petition for Writ of Habeas Corpus with the Oklahoma Court of Criminal Appeals in Oklahoma City and the jail failed to mail the petition and he was denied access to the law library. (Ex. "C" to Defendant's Brief, pgs. 31-34). His only alleged denial of court access after trial is the failure to mail the Writ. (Ex. "C" to Defendant's Brief, pgs. 40, 55).

Meaningful access to the courts must be provided. Bounds, v. Smith, 430 U.S. 817, 823 (1977). As Bounds recognized, however, this need can be addressed in several ways. The relevant inquiry is whether the inmate has been given a "reasonably adequate opportunity" to present his claim. Id. at 825. Prison authorities may deny access to a law library when the prisoners receive other adequate legal assistance. Toussaint v. Mccarthy, 801 F.2d 1080, 1110 (9th Cir. 1986), cert. denied, 481 U.S. 1069 (1987). In Toussaint, the court explained that, if direct access to a library is denied, a state may meet its Bounds obligations in various ways, one of which is the use of prison law clerks.

Plaintiff admits he was assisted by law clerks in his deposition (Ex. "C" to Defendant's Brief, pg. 48). His complaint is really a complaint of insufficient access to a law library, as opposed to a complete denial of such access. Therefore, in order to state a claim for relief he must show prejudice or an actual injury to his attempts at litigation. In Magee v. Waters, 810 F.2d 451, 452 (4th Cir. 1987), the court upheld summary judgment against a prisoner's claim of limited access to a jail library when there was no actual injury or specific harm caused from the limited access.

Plaintiff admitted he was represented by counsel before and at trial. (Ex. "C" to Defendant's Brief, pg. 31). The fact that he has pressed this suit and written extensive

briefs containing citations to case law suggest that he has had access to legal materials and has not been constitutionally harmed. He admits all his legal mail was properly mailed out by jail personnel except one petition for habeas corpus to the state court. (Ex. "C" to Defendant's Brief, pg. 55). Plaintiff has identified no jurisdictional deadline that he failed to meet as a result of this isolated instance of nonfeasance on the part of the jail staff, and is unable to demonstrate prejudice as a result of the failure to mail. Defendant's Motion for Summary Judgment (Docket #40) should be granted as to Plaintiff's claim that he was denied access to the court.

Plaintiff complains of several other aspects of his confinement. He claims he has been denied newspapers, games, radios, television, large stamped envelops for mailing, and haircuts. The jail conditions are far from ideal, but these claims do not constitute violations of plaintiff's constitutional rights. Defendants' Motion for Summary Judgment (Docket #40) should be granted as to the remainder of plaintiff's claims.

In summary, Defendant's Combined Motion to Dismiss or in the Alternative Motion to Stay Proceedings (Docket #29) should be denied and Defendant's Motion for Summary Judgment (Docket #40) should be granted in its entirety.

Pursuant to 28 U.S.C. § 636(b)(1)(C), the parties are given ten (10) days from the above filing date to file any objections with supporting brief to these findings and recommendations. Failure to object within that time period will result in waiver of the right to appeal from a judgment of the district court based upon the findings and recommendations of the Magistrate Judge.

Dated this 21st day of March, 1995.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

T:Roberts.rr

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

KAY GRIMES, an Individual, and TRACI GRIMES, an Individual,

Plaintiffs,

v.

CBS BROADCAST INTERNATIONAL OF CANADA, LTD, a foreign corporation, and CBS ENTERTAINMENT PRODUCTIONS "TOP COPS", a television program owned and operated by CBS Broadcast International of Canada, Ltd.,

Defendants.

Case No. 93-C-748-H

O R D E R

This matter comes before the Court on a motion for summary judgment by Defendants CBS Broadcast International of Canada, Ltd. and CBS Entertainment Productions "Top Cops" (collectively, "CBS").[1]

Plaintiffs Kay and Traci Grimes brought this action against Defendants,[2] alleging that CBS invaded their privacy by placing them in a false light when it aired a feature story which appeared on the CBS television program, "Top Cops", on or about October 15,

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[1] By order dated August 1, 1994, this Court denied Defendants' first motion for summary judgment. At a December 7, 1994 scheduling conference, however, the Court invited Defendants to resubmit their motion with a copy of the videotape at issue attached as an exhibit. The Court has carefully reviewed the tape for the purpose of ruling on Defendants' instant motion.

[2] Defendant CBS Broadcast International of Canada, Ltd. was the owner of Defendant CBS Entertainment Productions "Top Cops" at the time the television program containing the segment at issue aired.

1992. The feature story included a dramatization of the murder in 1978 of Lt. Pat Grimes, an officer in the Oklahoma Highway Patrol. Lt. Grimes was the husband and father of Plaintiffs Kay Grimes and Traci Grimes, respectively. Within that portion of the program involving Lt. Grimes, there is a segment in which actors purport to re-enact a brief telephone conversation involving Lt. Grimes, his wife, and his daughter. This approximately 40 second segment is the only portrayal of Plaintiffs by Defendants.

Summary judgment is appropriate where "there is no genuine issue as to any material fact," Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Windon Third Oil & Gas Drilling Partnership v. Federal Deposit Insurance Corp., 805 F.2d 342, 345 (10th Cir. 1986), cert. denied, 480 U.S. 947 (1987), and "the moving party is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(c). In Celotex, the Supreme Court stated:

> "[t]he plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

477 U.S. at 322.

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific facts, Fed. R. Civ. P. 56(e), sufficient to raise a "genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In Anderson, the Supreme Court stated:

> The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there

must be evidence on which the jury could reasonably find for the plaintiff.

477 U.S. at 252. Thus, to defeat a summary judgment motion, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986).

For purposes of this motion, the Court accepts as true certain allegations by Plaintiffs which are identified herein. As a result, the facts necessary to decide this motion, as determined from the record, are not in dispute.

Defendants based the "Top Cops" feature on the true story of two convicts' escape from the Oklahoma State Penitentiary and the subsequent efforts by law enforcement in several states to apprehend them. The feature story lasts 10 minutes and 25 seconds. The story opens with the convicts' escape from prison and traces their journey through Texas to Alabama and finally back to Oklahoma, during which journey they kill nine people.

The feature then recounts a massive manhunt by Oklahoma law enforcement officials. Hoyt Hughes, the partner of Lt. Grimes, personally narrates the story. Lt. Hughes and Lt. Grimes become involved with the manhunt upon learning that the escaped prisoners had returned to the state. After the convicts murder two highway patrolmen, a police helicopter tracks the escapees and radios Lts. Hughes and Grimes with their nearby location. The story depicts the tragic confrontation between the officers and the criminals: both officers and the two convicts are shot, and Lt. Grimes dies before an ambulance can reach the scene. Defendants denominated

the feature story as a "memorial show" to honor law enforcement officers who have died in the line of duty, including Lt. Grimes.

The segment of the feature story in which actors portray Plaintiffs is limited to the depiction of a purported telephone call from Lt. Grimes to his wife shortly before receiving the radio call on the day of his death. The brief scene at issue consists of the following dialogue:

Lt. Grimes:	Well, people keep spotting them, they're out there somewhere. I'm sure of it.
Kay Grimes:	Do you think you'll get some time off for the weekend?
Lt. Grimes:	No, I'm afraid we're in it for a while, Hon.
Kay Grimes:	I think Tracy's really starting to miss you.
Lt. Grimes:	Well, hopefully we'll have 'em by the end of the weekend. Tell her Hoyt's little one, Carrie Lynne, says "Hi".
Kay Grimes:	Sweetheart, you wanna give daddy a kiss goodbye?
Tracy Grimes:	Bye, daddy. . .
Lt. Grimes:	Bye, darling. . .
Kay Grimes:	You take care of yourself now.
Lt. Grimes:	Okay, bye Hon -- love ya. . .
Kay Grimes:	I love you too!

The scene alternates between Lt. Grimes in a telephone booth by the side of the road, and his wife and young child in the kitchen of their home. The kitchen appears to be clean and well-furnished with white cabinets and modern appliances. Traci Grimes is eating at the kitchen table. Kay Grimes is preparing breakfast

and pouring juice for her daughter while she talks to her husband on the telephone. Kay Grimes is portrayed as an attractive blonde woman in her early to mid-thirties. She is neatly dressed in a blouse and skirt. The expressions on her face are consistent with her words over the telephone, and are those of a loving wife and mother, concerned for the well-being of her family. Kay Grimes hands the receiver to her daughter to say goodbye.

For purposes of this motion, the Court accepts the contention of the Plaintiffs that this conversation did not occur. According to Plaintiffs, Kay Grimes' last conversation with her husband in fact resulted in an argument. Affidavit of Kay Grimes, sworn to March 23, 1994 ("Kay Grimes Aff.") ¶ 8. Plaintiffs assert that Defendants' brief portrayal of Plaintiffs placed them in a false light and that Defendants are therefore liable for emotional distress damages as well as punitive damages. Id. ¶¶ 7-12; Affidavit of Traci Grimes, sworn to March 23, 1994 ("Traci Grimes Aff.") ¶¶ 3, 8-10, 13.[3]

Oklahoma recognizes the invasion of privacy tort for publicity placing persons in a false light. McCormack v. Oklahoma Publishing Co., 613 P.2d 737, 740 (Okl. 1980). In McCormack, the Oklahoma

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[3] Although Plaintiffs' sole claim in the complaint is for a false light invasion of their own privacy, in their objection to Defendants' motion, Plaintiffs also claim that the segment grossly misportrays the demeanor and dialect of Lt. Grimes. For purposes of this motion, the Court accepts as true Plaintiffs' contention that the portrayal of Lt. Grimes was inaccurate and offensive to his family and friends. It is settled law, however, that an action for invasion of privacy may only be maintained by a living person. Restatement (Second) of Torts § 652I cmt. b (1977) (personal character of right of privacy); Swickard v. Wayne County Medical Examiner, 475 N.W.2d 304, 309 (Mich. 1991).

Supreme Court expressly adopted this tort as set forth in the Restatement (Second) of Torts:

> One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if
>
> (a) the false light in which the other was placed would be highly offensive to a reasonable person, and
>
> (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

Id.; accord Polin v. Dun & Bradstreet, Inc., 768 F.2d 1204, 1206 (10th Cir. 1985) (applying Oklahoma law).

To make out a claim for false light invasion of privacy, Plaintiffs must prove that (1) Defendants gave publicity to a matter placing Plaintiffs before the public in a false light; (2) the false light would be highly offensive to reasonable persons under the circumstances; and (3) Defendants had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light. McCormack, 613 P.2d at 740.

In support of the instant motion, Defendants argue solely that Plaintiffs' claim should fail because they cannot satisfy the second element of the tort, namely, that no reasonable person would find the approximately 40 second segment portraying Plaintiffs as loving family members to be "highly offensive."

The threshold question is whether the Court may determine, as a matter of law, whether Defendants have placed Plaintiffs in a light which would be "highly offensive" to a reasonable person under the circumstances.

Oklahoma law does not specifically address this issue with respect to the false light invasion of privacy tort. Other courts, however, have answered this question by analogy to the role of the court in defamation actions. See, e.g., Fudge v. Penthouse Int'l, Ltd., 840 F.2d 1012, 1018 (1st Cir.) ("it is widely recognized that claims for defamation and false light have much in common") (citations omitted), cert. denied, 488 U.S. 821 (1988). In Oklahoma, it is the duty of the court in libel and slander cases to determine in the first instance whether the language used in the alleged publication is defamatory as a matter of law. E.g., M. F. Patterson Dental Supply Co. v. Wadley, 401 F.2d 167, 169 (10th Cir. 1968) (applying Oklahoma law); Kee v. Armstrong, Byrd & Co., 182 P. 494, 497 (1919), overruled in part on other grounds sub nom. Dusabek v. Martz, 249 P. 145 (Okl. 1926); accord Restatement (Second) of Torts § 614(1) (1977) (court determines whether communication is capable of having a particular meaning and whether that meaning is defamatory).[4]

In Fudge, the court applied Restatement principles to interpret Rhode Island law and reasoned that the role of the court in false light tort actions should mirror the role of the court in defamation actions. 840 F.2d at 1018-19. The court concluded that, in a false light invasion of privacy case, it is the role of the court to "make the threshold determination of whether a

[4] Further, the Restatement recognizes that "long standing limitations" in defamation cases, such as the court's ability to evaluate the offensiveness of the statement in the first instance, should also be applied to false light claims. See Restatement (Second) of Torts § 652E, cmt. e (1977).

statement is capable of implying the objectionable association of which the plaintiff complains." Id. at 1018. Based on the Oklahoma rule in libel and slander cases, the adoption by Oklahoma of the Restatement in false light cases, see McCormack, supra, and other authority analogizing to defamation cases to determine the proper role of the court in false light cases, this Court concludes that it may determine whether the brief portrayal of Plaintiffs in the "Top Cops" feature is "highly offensive" as a matter of law. See, e.g., Fudge, 840 F.2d at 1018 (applying Rhode Island law); see also Braun v. Flynt, 726 F.2d 245, 253 (applying Texas law), reh'g denied, 731 F.2d 1205 (5th Cir.), cert. denied, 469 U.S. 883 (1984); Cibenko v. Worth Publishers, Inc., 510 F. Supp. 761, 766 (D.N.J. 1981) (applying New Jersey law).

The Oklahoma Supreme Court has not articulated what constitutes a "highly offensive" depiction or statement in a claim for false light invasion of privacy.[5] Therefore, this Court must seek guidance as to the interpretation of this standard from the Restatement (Second) of Torts § 652E, adopted in McCormack, supra, and from other jurisdictions.

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[5] In Munley v. ISC Financial House, Inc., 584 P.2d 1336, 1339-40 (Okl. 1978), the Supreme Court discussed the "highly offensive" element with regard to two related invasion of privacy torts: intrusion upon seclusion and publicity given to private life. There, plaintiff debtor sued a creditor to recover damages for harassment and coercive collection practices. The Court upheld the trial court's grant of summary judgment to the creditor on grounds that defendant's conduct would not be "highly offensive to a reasonable person," adopting the Restatement standard for the "highly offensive" element of such related invasion of privacy torts. (At that time, the form of current Section 652A of the Restatement was Tentative Draft No. 22, Section 652 for actions based upon invasion of privacy.)

Comment c to the Restatement (Second) § 652E, which explains the "highly offensive" standard, states in its entirety as follows:

> [t]he rule stated in this Section applies only when the publicity given to the plaintiff has placed him in a false light before the public, of a kind that would be highly offensive to a reasonable person. In other words, it applies only when the defendant knows that the plaintiff, as a reasonable man, would be justified in the eyes of the community in feeling seriously offended and aggrieved by the publicity. Complete and perfect accuracy in published reports concerning any individual is seldom attainable by any reasonable effort, and most minor errors, such as a wrong address for his home, or a mistake in the date when he entered his employment or similar unimportant details of his career, would not in the absence of special circumstances give any serious offense to a reasonable person. The plaintiff's privacy is not invaded when the unimportant false statements are made, even when they are made deliberately. It is only when there is such a major misrepresentation of his character, history, activities or beliefs that serious offense may reasonably be expected to be taken by a reasonable man in his position, that there is a cause of action for invasion of privacy. (emphasis added).

To avoid a conflict with First Amendment rights, courts have narrowly construed the "highly offensive" standard. See, e.g., Machleder v. Diaz, 801 F.2d 46, 58 (2d Cir. 1986). In Dempsey v. National Enquirer, Inc., 687 F. Supp. 692, reconsideration denied, 702 F. Supp. 927 (D. Me. 1988), the court considered whether portions of a newspaper article, alleged by plaintiff to be false, could, as a matter of law, be viewed as highly offensive to a reasonable person. The article included 21 paragraphs of quoted statements, ascribed to the plaintiff, which purported to recount his state of mind as he clung precariously to the door of an aircraft in flight. The court found that the "mere description of physical sensations and predictable fears which might be experienced by an individual who falls out of an airplane while in

flight" would not be highly objectionable to a reasonable person. Id. at 694-95.

In Fudge, the plaintiffs, four schoolgirls, ages 8-12, alleged in relevant part that the article at issue implied that the girls were masculine in nature and wished to dominate their male schoolmates and, for that reason, their school instituted sexually segregated recesses. 840 F.2d at 1012. The court concluded that these allegations would not, as a matter of law, "be objectionable to the ordinary reasonable man under the circumstances." Id. at 1019.

Similarly, in Machleder, 801 F.2d at 56, plaintiff alleged that the broadcast portrayed him in a false light by showing him as "intemperate and evasive or as an illegal dumper of chemical wastes." The court ruled that "no reasonable juror could have concluded that the alleged portrayal was highly offensive." Id. at 58.[6]

In the instant case, Defendants portray Plaintiff Kay Grimes as a loving wife and mother. The purported telephone conversation suggests that she is the center of a high quality family life. The Court concludes that a reasonable person would view this portrayal as highly favorable.

Defendants portray Plaintiff daughter Traci Grimes as a happy,

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[6] See also Douglass v. Hustler Magazine, Inc., 769 F.2d 1128, 1137 (7th Cir. 1985), cert. denied, 475 U.S. 1094 (1986); Virgil v. Sports Illustrated, 424 F. Supp. 1286, 1289 (S.D. Cal. 1976); Arrington v. New York Times Co., 55 N.Y.2d 433, 441-42, 434 N.E.2d 1319, 1323, 449 N.Y.S.2d 941, 945, reh'g denied, 57 N.Y.2d 669, 439 N.E.2d 884, 454 N.Y.S.2d 75 (1982), cert. denied, 459 U.S. 1146 (1983).

healthy, attractive, and well-cared for child. The only words attributed to her during the purported telephone conversation with her father are "Bye, daddy". The Court concludes that a reasonable person would view this portrayal of Traci Grimes as highly favorable as well.

Defendants argue that no reasonable person would be highly offended by such highly favorable portrayals. In opposition to Defendants' motion, Plaintiffs have offered no authority to support their claim that such highly favorable portrayals may nevertheless be considered "highly offensive" under applicable law. Instead, Kay Grimes offers the following factors to show that a reasonable person in her position would be highly offended by her portrayal in the "Top Cops" segment: (1) that she expressly refused to consent to the broadcast, Kay Grimes Aff. ¶¶ 4, 10; (2) that, as a result of Defendants' conduct in attempting to procure a release and her express refusal to sign the release proffered by Defendants prior to the airing of the "Top Cops" episode, her sensitivities were heightened regarding her ultimate portrayal in the segment, id. ¶¶ 2-6, 10; (3) that the scene portraying her never occurred, id. ¶ 8; and (4) that the "Top Cops" broadcast "falsely characterized [her] deceased husband by having his 'actor' use southern 'Hick' slang and having him swear repeatedly", id. ¶ 10.

Plaintiff Traci Grimes cites essentially the same factors as her mother: (1) that she did not consent to her portrayal in the broadcast, Traci Grimes Aff. ¶ 2; (2) that "Top Cops" never contacted her to request her consent, id. ¶ 12; (3) that the

telephone call depicted never occurred, id. ¶¶ 3, 8, 13; (4) that her father was improperly portrayed as a "southern hick", "cuss[ing] repeatedly", not "in an honorable manner", and different from her memories, id. ¶¶ 7, 11-13; and (5) that her image of her father, who died when she was four years old, has been distorted by her viewing of the "Top Cops" segment, id. ¶¶ 4, 6. The Court accepts as true the above-referenced statements of Kay Grimes and Traci Grimes and has carefully considered these factors in rendering this opinion.

The first two factors cited by Plaintiffs involve their failure to consent to the broadcast. For a false light invasion of privacy tort, the Court must focus on the actual portrayal of Plaintiffs by Defendants. The Court concludes that, under the facts of this case, Defendants' failure to secure the consent of Plaintiffs does not convert the highly favorable portrayal into a "highly offensive" portrayal. See, e.g., LaMonaco v. CBS Inc., 22 Med. L. Rptr. (BNA) 1831, 1832 (3d Cir. May 6, 1994) (unpublished opinion) (district court properly "shielded [defendants] from liability without regard to any person's consent or objection to the airing of the telecast").

Plaintiffs' third factor is equally unpersuasive. To satisfy the first element of the tort of false light invasion of privacy, Plaintiffs must prove that they were portrayed "in [a] false manner or that statements were untrue or misleading." McCormack, 613 P.2d at 741. The Court does not believe that, under the circumstances of this case, the fact that the telephone conversation never

occurred informs the Court as to whether the portrayal of Kay Grimes or Traci Grimes is highly offensive. Finally, Plaintiffs' assertion that the false characterization of Lt. Grimes would make their portrayals highly offensive to a reasonable person is also unavailing. See supra text accompanying note 3.

In sum, using the factors cited by Plaintiffs above, they appear to argue that "[t]he tort of false light invasion of privacy seeks to recover for injury to the plaintiff's own feelings." Plaintiffs' Brief in Support of Objection to Defendants' Motion for Summary Judgment at 6. Plaintiffs contend, in effect, that the tragedy suffered by the Grimes' family in 1978 and Plaintiffs' personal anguish as a result of the content and surrounding circumstances of the "Top Cops" program should convert their portrayal by Defendants from highly favorable to "highly offensive" as a matter of law. However, to prove that statements are "highly offensive", the Restatement standard, cited by the Oklahoma Supreme Court in Munley, requires that "serious offense may reasonably be expected to be taken by a reasonable man in his position." Restatement (Second) of Torts § 652E cmt. c (emphasis added). An action for false light invasion of privacy "[cannot] be premised on mere harm to one's feelings." Colbert v. World Publishing Co., 747 P.2d 286, 289-90 (Okl. 1987) (citation omitted); accord W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 117, at 864 (5th ed. 1984) ("[I]t must be something that would be objectionable to the ordinary reasonable person under the circumstances, and . . . the hypersensitive individual will not be protected.").

In the instant case, the entire feature is 10 minutes and 25 seconds in length. The primary actors in the story are the escaped convicts. Lt. Grimes is featured as a result of his death. Plaintiffs are in no way the focus or subject matter of the feature story. The 40 second segment in which Plaintiffs are portrayed on a telephone call does not purport to be a major representation of their "character, history, activities, or beliefs", comment c to Restatement (Second) of Torts § 652E. To the contrary, any representations of Plaintiffs are limited, and their role in the story is incidental. They apparently are depicted solely to emphasize the tragedy of Lt. Grimes' death.

This Court concludes, therefore, that a portrayal which is highly favorable, brief, and entirely incidental to a fictionalized re-enactment of events which occurred over thirteen years earlier is not "highly offensive" to a reasonable person as a matter of law under the totality of the circumstances presented in this case. Accordingly, Plaintiffs cannot maintain an action for false light invasion of privacy under applicable Oklahoma law, and Defendants' motion for summary judgment as to Plaintiffs Kay Grimes and Traci Grimes is hereby granted.

IT IS SO ORDERED.

This 23RD day of MARCH, 1995.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

PABLO CABRERA,

Plaintiff,

vs.

DANIEL OWENS, et al.,

Defendants.

No. 94-C-501-H

ENTERED ON DOCKET
DATE MAR 23 1995

FILED
MAR 22 1995
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

ORDER

On February 13, 1995, the Court denied without prejudice Defendants' motion to dismiss or in the alternative for summary judgment, and granted Plaintiff twenty days to submit a motion for leave to amend and a proposed amended complaint. (Doc. #11.) As of the date of this order, the Plaintiff has neither filed a motion for leave to amend nor moved for an extension of time.

ACCORDINGLY, IT IS HEREBY ORDERED that unless Plaintiff files a motion for leave to amend and a proposed amended complaint as set out in the February 13, 1995 order, on or before eleven (11) days from the date of entry of this order, the Court will dismiss this action for lack of prosecution.

SO ORDERED THIS 22ND day of MARCH, 1995.

SVEN ERIK HOLMES
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TEDDY FOWLER,

Petitioner,

vs.

CLIFFORD HOPPER,

Respondent.

No. 95-C-35-B

ORDER

On January 11, 1995, Teddy Wayne Fowler, a Tulsa County pretrial detainee, filed a pre-trial petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2241, alleging the denial of his right to a speedy trial in Tulsa County Case Nos. 94-1955 and 94-2024.[1] On February 13, 1995, Respondent moved to dismiss for failure to exhaust state remedies to which the Petitioner has filed an objection. On March 2, 1995, the Court received a letter from the Petitioner, requesting the appointment of counsel in the instant action and informing the Court that on February 21, 1995, a jury found him guilty in Case Nos. 94-1955 and 94-2024.

Because Petitioner has since been tried, the Court abstains from exercising jurisdiction over this pre-trial habeas petition.

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[1]Prior to this action, Petitioner filed a civil rights action against District Judge Clifford Hopper for violating his right to a speedy trial. He alleged that since he refused to plead guilty on September 7, 1994, Judge Clifford Hopper had postponed his jury trial on two different occasions and the Public Defender had refused to visit him at the Tulsa County Jail to discuss his defense. Plaintiff sought the dismissal of his larceny charge on the ground that he had been denied the right to a speedy trial. On December 13, 1994, this Court dismissed that action without prejudice to it being refiled as a pre-trial habeas corpus action. Fowler v. Hopper, 94-C-1068-B.

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Petitioner's speedy trial issue can and must be considered first by the state courts. See Capps v. Sullivan, 13 F.3d 350, 354 n.2 (10th Cir. 1993) ("'federal courts should abstain from the exercise of . . . jurisdiction if the issues raised in the [2241] petition may be resolved either by trial on the merits in the state court or by other state procedures . . .'" (quoting Dickerson v. Louisiana, 816 F.2d 229, 226 (5th Cir.), cert. denied, 484 U.S. 956 (1987)). If Petitioner desires to pursue his speedy trial issue, he must raise the issue first on direct appeal as a federal defense to his conviction before raising it in this court in a habeas petition pursuant to 28 U.S.C. § 2254. See Braden v. 30th Judicial Circuit Court, 410 U.S. 484, 488-90 (1973).

ACCORDINGLY IT IS HEREBY ORDERED that:

(1) Respondent's motion to dismiss (doc. #6) is **granted**;

(2) Petitioner's request for appointment of counsel, submitted in letter form, is **denied**; and

(3) This habeas corpus action is **dismissed without prejudice**.

SO ORDERED THIS 29th day of March, 1995.

THOMAS R. BRETT, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

HOMER H. HUBBARD,

Petitioner,

vs.

STEVE HARGETT,

Respondent.

No. 95-C-64-B

ORDER

At issue before the Court in this habeas corpus action pursuant to 28 U.S.C. § 2254, is Respondent's motion to dismiss the petition for failure to exhaust state remedies. The Petitioner concurs with Respondent's motion.

ACCORDINGLY, IT IS HEREBY ORDERED that Respondent's motion to dismiss (doc. #3) is **granted** and this habeas corpus action is **dismissed without prejudice** to it being refiled after the Petitioner has exhausted all his available state remedies.

SO ORDERED THIS 23rd day of March, 1995.

THOMAS R. BRETT, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

VERNON HALL,)
)
Petitioner,)
)
vs.) No. 94-C-262-B
)
ED EVANS,)
)
Respondent.)

ORDER

This is a proceeding on a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner Vernon Hall, currently confined in the Oklahoma Department of Corrections, challenges the judgment and sentence of the Osage County District Court for Forcible Sodomy, After Former Conviction of a Felony, Case No. CRF-84-25. The Respondent has filed a Rule 5 Response to which the Petitioner has replied. For the reasons stated below, the Court concludes that Petitioner's application for a writ of habeas corpus should be denied.

I. BACKGROUND

In June 1984, Vernon Hall, Petitioner, was tried jointly with Marcus Madden for forcible sodomy of Rocky Ostrander, a fellow inmate at Dick Conner Correctional Center (DCCC). The jury found both defendants guilty and set punishment at forty years imprisonment. The Oklahoma Court of Criminal Appeals affirmed the judgement and sentence in Hall's direct appeal on August 25, 1988. Hall v. State, 762 P.2d 264 (Okla. Crim. App. 1988).

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In the present petition for a writ of habeas corpus, Hall alleges that the evidence was insufficient to warrant a conviction because the evidence was totally uncorroborated. He alleges that his conviction was based solely on the testimony of the alleged victim, Rocky Ostrander, who had a long history of mental illness and an unstable past with numerous instances of sexual assault and abuse, and commitment to several mental institutions. Petitioner further alleges that he was denied a fair trial through prosecutorial misconduct, that he was subject to double jeopardy in violation of his constitutional rights, and that his trial counsel provided ineffective assistance under the Sixth Amendment.

The trial transcript reveals that in December 1983 and January 1984, Hall, Madden, and Ostrander worked together in the laundry at DCCC. Ostrander testified that Hall and Madden had made sexual advances toward him about December 24, 1983, and that they pushed and shoved him around on January 7, 1984. He testified that about 7 a.m. on January 12, 1984, Hall and Madden entered his cell, tore his underwear off, and sodomized him while a third man kept a watch. He testified that the three men left about 7:30 a.m. and that he remained in his cell all day along except for going to the laundry to get his clothes around 8:30 a.m. Ostrander did not report the attacks until the laundry supervisor located him outside the gym about 6:00 p.m. that evening and inquired about his absence from work for the past two days. At that time the laundry supervisor summoned Ostrander to his office to talk. Ostrander had visited with the laundry supervisor on previous occasions about

being sexually harassed by Hall and Madden in the laundry. Although Ostrander reported that Hall and Madden had sodomized him, he did not indicate that the sodomy incident had occurred earlier that day. As a result no investigation or medical examination was conducted. Ostrander was placed in protective custody for the evening.

II. ANALYSIS

As a preliminary matter, the Court must determine whether Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). See Rose v. Lundy, 455 U.S. 509, 510 (1982). Exhaustion of a federal claim may be accomplished by either (a) showing the state's appellate court had an opportunity to rule on the same claim presented in federal court, or (b) that at the time he filed his federal petition, he had no available means for pursuing a review of his conviction in state court. White v. Meachum, 838 F.2d 1137, 1138 (10th Cir. 1988); see also Wallace v. Duckworth, 778 F.2d 1215, 1219 (7th Cir. 1985); Davis v. Wyrick, 766 F.2d 1197, 1204 (8th Cir. 1985), cert. denied, 475 U.S. 1020 (1986). Respondent concedes, and this Court finds, that the Petitioner meets the exhaustion requirements under the law.

The Court also finds that an evidentiary hearing is not necessary as the issues can be resolved on the basis of the record, see Townsend v. Sain, 372 U.S. 293, 318 (1963), overruled in part by Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992). The granting of such a hearing is within the discretion of the court, and this Court

finds that a hearing is not necessary. Petitioner's motion for an evidentiary hearing must therefore be denied.

A. Sufficiency of the Evidence

First Petitioner alleges that there was insufficient evidence to support his conviction. In particular he claims that corroboration of the victim's testimony was necessary because Ostrander's testimony was inconsistent and he had a long history of mental illness.

While corroboration is not always demanded in nonconsenting sex crimes, Oklahoma case law requires corroboration in lewd molestation, sodomy, and rape cases "when the victim's testimony is so incredible or has been so thoroughly impeached that a reviewing court must say that the testimony is clearly unworthy of belief." Salyer v. State, 761 P.2d 890, 895 (Okla. Crim. App. 1988) (citing Martin v. State, 747 P.2d 316, 318 (Okla. Crim. App. 1987) (sodomy); Still v. State, 484 P.2d 549, 551 (Okla. Crim. App. 1971) (lewd molestation); Beshears v. State, 738 P.2d 1375, 1377 (Okla. Crim. App. 1987) (rape)); see also Hinkle v. State, 771 P.2d 232, 234 (Okla. Crim. App. 1989).

In the instant case, the Oklahoma Court of Criminal Appeals decided that even if Ostrander's testimony was inconsistent and contradictory, that there was sufficient corroborative evidence from the laundry supervisor to sustain Petitioner's conviction. The Court of Criminal Appeals stated:

> The laundry supervisor related prior instances where [Ostrander] indicated he had been the target of sexual

> advances and he could tell that there was a conflict between [Ostrander] and the defendants by observing them at work. Of more importance is the witness' corroborating testimony that [Ostrander] did not go to work the day of the attack, and an admission by defendant Hall that he was in C block, the location of [Ostrander's] cell, the morning of the attack. We think that the amount of corroboration here is "of such dignity as to give it weight with the jury upon the question that the actual crime has been committed," and is sufficient. Based on all the evidence presented in the light most favorable to the State, we find that a rational trier of fact could find the essential elements of the crime charged beyond a reasonable doubt.

(Ex. B at 2-3, attached to Respondent's response, doc. #4).

This Court need not address whether Ostrander's testimony was sufficiently corroborated under Oklahoma state law. Any violation of the corroboration requirement is a matter of state law not cognizable in this habeas corpus action. See Harrington v. Nix, 983 F.2d 872, 874 (8th Cir. 1993) (Iowa statute requiring corroboration of accomplice's testimony did not implicate constitutional concerns that could be addressed on habeas review); Garcia v. Powers, 973 F.2d 684, 685 (8th Cir. 1992) (any violation of corroboration requirement is violation of state law and not cognizable in habeas review). It is well established that in reviewing a federal habeas petition, this Court is limited to deciding whether a conviction has violated the Constitution, laws, or treaties of the United States. Estelle v. McGuire, 502 U.S. 62, 67 (1991).

To the extent that Petitioner challenges the sufficiency of the evidence at his state trial, the Court will proceed to review that issue. Sufficiency of the evidence for constitutional purposes is essentially a question of law. As such this Court

reviews a habeas claim of insufficiency to determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979). In reviewing a sufficiency claim, the Court must not weigh conflicting evidence or consider witness credibility. United States v. Davis, 965 F.2d 804, 811 (10th Cir. 1992), cert. denied, 113 S. Ct. 1255 (1993). Instead the Court must view the evidence in the light most favorable to the prosecution, Jackson, 443 U.S. at 319, and "accept the jury's resolution of the evidence as long as it is within the bounds of reason." Grubbs v. Hannigan, 982 F.2d 1483, 1487 (10th Cir.1993). Additionally a state court's findings of fact on the sufficiency issue are entitled to a presumption of correctness unless challenged by convincing evidence that the factual determination in the state court was erroneous. 28 U.S.C. § 2254(d); Sumner v. Mata, 455 U.S. 591, 597 (1982).

Although this Court must apply a federal constitutional standard to determine whether the state presented sufficient evidence, the Court must look to Oklahoma law for the elements the state must prove in order to convict the Petitioner of forcible sodomy. The essential elements of the crime of forcible anal sodomy are: (1) sexual penetration of the anus, (2) by force or fear, (3) by threats, and (4) without consent. Okla. Stat. tit. 21, §§ 886-888 (1981) (amended by laws of 1990); Okla. Stat. tit. 21, § 888(B)(3) (1991). See also Kimbro v. State, 857 P.2d 798,

801 (Okla. Crim. App. 1990) (J. Parks concurring) (on the force and fear element); Salyer v. State, 761 P.2d 890, 894 (Okla. Crim. App. 1988) (on sexual penetration of the anus); Casey v. State, 732 P.2d 885, 888 (Okla. Crim. App. 1987) (on the consent element); Thicks v. State, 713 P.2d 18 (Okla. Crim. App. 1986) (on sexual penetration of the anus).

After a thorough review of the evidence, the Court concludes that a reasonable juror could have found the evidence sufficient to show that Petitioner committed the crime of forcible sodomy. The case at hand was basically a one-witness case centered on the testimony of Mr. Ostrander, the victim. While numerous inconsistencies were presented by Mr. Ostrander and the other witnesses, the Court notes that Ostrander unequivocally testified that on the morning of January 12, 1984, at about 7:00 a.m. the Petitioner and Madden each sexually penetrated his anus one time by force, without his consent, and while restraining him on the bed in his cell. Petitioner further testified that he did not leave his cell all day long except for picking up his clothing at the laundry around 8:30 a.m. The laundry supervisor confirmed Ostrander's statement that he did not go to work on the day of the attack and further testified that he had observed a conflict between Ostrander and the two defendants, and that Ostrander had been sexually harassed by the defendants on previous occasions.

The Petitioner argues, however, that Ostrander's testimony was inconsistent and conflicted with other evidence presented at

trial.[1] While this case was replete of inconsistencies by all witnesses, this Court cannot weigh any of the conflicting evidence which the Petitioner raises. Grubbs v. Hannigan, 982 F.2d 1483, 1487 (10th Cir.1993) (citing United States v. Davis, 965 F.2d 804, 811 (10th Cir. 1992), cert. denied, 113 S. Ct. 1255 (1993)). Nor can this Court consider the credibility of Ostrander as alleged in Petitioner's brief in support of his petition for a writ of habeas corpus. Grubbs, 982 F.2d at 1487. It is the province of the jury to weigh the evidence and judge witness credibility. As noted above this Court can only view the evidence in the light most favorable to the prosecution and "accept the jury's resolution of the evidence as long as it is within the bounds of reason." Id.

On the basis of this standard and after reviewing all the evidence presented at trial, the Court cannot conclude that it was unreasonable for the jury to find the Petitioner and his codefendant guilty of forcible sodomy. Accordingly, the Court concludes that there is substantial evidence in the record to support Petitioner's conviction.

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[1]For instance he contends that Ostrander's testimony that the attack occurred around 7:00 a.m. was contradicted by Officer Fatkin's testimony that the doors of Unit C (where Ostrander's was residing) were not opened until 7:38 a.m. He also contends that Ostrander's testimony that the laundry supervisor approached him and wanted to talk to him was contradicted by the supervisor's testimony that Ostrander was the one that wanted to talk to him in the first place. Similarly, Petitioner states that Ostrander's statements to the laundry supervisor--that his cell mate had locked him out of the cell--was controverted by earlier testimony that all cell doors had to be unlocked individually.

B. Prosecutorial Misconduct

Next the Court addresses Petitioner's claim of prosecutorial misconduct during closing argument. He alleges that the misconduct occurred when the prosecutor invoked societal alarm by asking the jury to "tack on some time" and "to deliver a message, and let it travel." (Tr. at 443.) Petitioner contends that societal alarm is improper especially in this case where the evidence was incredibly weak. The prosecutor's statements at issue are as follows:

> . . . I think there is a crime of forcible sodomy, and if you so find, I think there is evidence that you can find them guilty of forcible sodomy after former conviction of a felony, and if you so find, I do not want you to tack on time because they're black, because they're armed robbers, because they're in the penitentiary, but because they committed this crime, and if you so find, then I want you to tack on some time, and I'm going to ask you if you so find, that you tack on some time, because Rocky Ostrander testified when he got down to Granite everybody knew about the incident at Conners, so there's an underground system in the penitentiaries of Oklahoma where news travels fast, so if you find these defendants guilty of forcible sodomy after former conviction of a felony, I want you to deliver a message, and let it travel--
>
> MR. HALL: Your Honor, I need to object to that. That's improper form of argument.
>
> THE COURT: Be overruled. You're allowed an exception.
>
> MR. HALL: May I have an exception?

(Tr. at 442-443.)

In analyzing "whether a petitioner is entitled to federal habeas relief for prosecutorial misconduct, [a federal habeas court] must determine whether there was a violation of the criminal defendant's federal constitutional rights which so infected the trial with unfairness as to make the resulting conviction a denial

of due process." Fero v. Kerby, 39 F.3d 1462, 1473 (10th Cir. 1994) (citing Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974)); see also Coleman v. Saffle, 869 F.2d 1377, 1395 (10th Cir. 1989), cert. denied, 494 U.S. 1090 (1990). The factors considered in this due process analysis are: (1) the strength of the state's case; (2) whether the judge gave curative instructions regarding the misconduct; and, (3) the probable effect of the conduct on the jury's deliberative process. Hopkinson v. Shillinger, 866 F.2d 1185, 1210 (10th Cir. 1989), cert. denied, 497 U.S. 1010 (1990).

After carefully reviewing the record in this case, the Court concludes that the comments of the prosecutors noted above do not rise to a constitutional violation. In any event, in the context of the entire trial, the Court finds that the comments asking the jurors "to tack on so time" and "deliver a message" do not appear to be "so prejudicial" that they render the trial "fundamentally unfair."

C. Double Jeopardy

In his third ground for relief, Petitioner alleges that he has been subjected to double jeopardy because he was convicted after being acquitted in an earlier prison disciplinary hearing. The Oklahoma Court of Criminal Appeals denied this claim, finding that double jeopardy is not present in an administrative acquittal by prison officials and a subsequent trial in a court of law, citing Boyle v. State, 569 P.2d 1026, 1028 (Okla. Crim. App. 1977); Ex parte Kirk, 252 P.2d 1032, 1034-35 (1953). This Court agrees. Cf.

U.S. v. Rising, 867 F.2d 1255, 1259 (10th Cir. 1989) ("administrative punishment imposed by prison officials does not render a subsequent judicial proceeding, criminal in nature, violative of the double jeopardy clause") (cited cases omitted).

Accordingly, Petitioner is not entitled to habeas relief on double-jeopardy ground.

D. Effective Assistance of Counsel

In support of his claim of ineffective assistance of counsel, Petitioner argues that his counsel did not have enough time to prepare for trial and to search for witnesses, in particular a Mr. McCarthers. He also alleges that counsel was hampered by the fact that Petitioner and his co-defendant were incarcerated at different prisons.

Under Strickland v. Washington, 466 U.S. 668, 687 (1984), a habeas petitioner must satisfy a two-part test to establish that his trial counsel provided ineffective assistance. First, he must show that his attorney's performance "fell below an objective standard of reasonableness," id. at 688, and second, he must show that there is a "reasonable probability" that but for counsel's error, the outcome would have been different, id. at 694.

After reviewing the entire record, the Court is of the opinion that Petitioner's claim is without merit because Petitioner has failed to satisfy either part of the Strickland test. First, Petitioner has not sustained his burden of proving that the conduct of his defense counsel fell below an objective standard of

reasonableness. After a thorough review of the trial transcript, this Court finds that counsel was well within the range of reasonable competency. He vigorously cross-examined and re-cross examined Ostrander and the other state witnesses.

To the extent that Petitioner argues that the time constraints rendered counsel's assistance ineffective under the Sixth Amendment, the Court concludes that Petitioner has not established prejudice as a result of the inadequate time for preparation. See United States v. Larouche, 896 F.2d 815, 825 (4th Cir. 1990), cert. denied, 496 U.S. 927 (1994) (defendant who alleges that trial counsel's assistance was ineffective because of inadequate time to prepare for trial must identify specific prejudice which results from lack of time for preparation). In this case, Petitioner has identified Mr. McCarthers as a possible witness which his attorney could have interviewed had he been given adequate time. However, any testimony from Mr. McCarthers with regard to Ostrander's motive for fabricating a story about being sexually assaulted would not have changed the result of the trial. While Ostrander had escaped from a penal institution in 1981, the escape issue had been resolved by the time he went to DCCC where this incident occurred.

Accordingly, Petitioner is not entitled to habeas relief on the ground of ineffective assistance of counsel.

III. CONCLUSION

After carefully reviewing the record in this case, the Court concludes that the Petitioner has not established that he is in custody in violation of the Constitution or laws of the United States. **ACCORDINGLY, IT IS HEREBY ORDERED** that the petition for a writ of habeas corpus and Petitioner's motion for an evidentiary hearing (doc. #12) are **denied**.

SO ORDERED THIS 23rd day of March, 1995.

THOMAS R. BRETT, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DOYLE KENT KING,

Petitioner,

vs.

RON CHAMPION, et al.,

Respondent.

No. 92-C-165-E

ORDER

Petitioner Doyle Kent King, through counsel, has renewed his motion seeking dismissal of the issues raised in Grounds Two and Three of his Petition for Writ of Habeas Corpus, filed February 25, 1992. Petitioner, through counsel, has also reurged a prior request for certification of the Court's Findings of Fact and Conclusions of Law and Judgment, filed August 10, 1993. The initial requests were not opposed by the respondents.

Upon consideration of the motion, supporting brief and the Tenth Circuit's Order of March 3, 1995, the Court finds the motions should be granted. **ACCORDINGLY, IT IS HEREBY ORDERED that:**

(1) Petitioner's renewed motion to dismiss and his motion to withdraw habeas corpus issues without prejudice and for order (docs. #13-1, #7-1, and #7-2) are **granted** and the claims for relief based on Grounds Two and Three are **dismissed without prejudice**;

(2) Petitioner's motion for Rule 54(b) certification of the Findings of Fact and Conclusions of Law and Judgment entered August 10, 1993, (doc. #13-2) is **granted**. The

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Court finds the Judgment entered on the Findings of Fact and Conclusions of Law constitutes a final judgment as to the August 10, 1993 claim of delay raised by the Petitioner. In accordance with Rule 54(b), Fed. R. Civ. P., the Court finds there is no reason for delay and that the prior rulings of the Court expressly directed the entry of judgment.

SO ORDERED THIS 22d day of March, 1995.

JAMES O. ELLISON, Senior Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE MAR 2 3 1995

JOSEPH J. GARBER,

Plaintiff,

v.

DEWEY "BUCK" JOHNSON, individually and as Sheriff of Rogers County, Oklahoma; and the BOARD OF COUNTY COMMISSIONERS OF ROGERS COUNTY, OKLAHOMA,

Defendants.

Case No. 93-C-564-BU

FILED

MAR 22 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

O R D E R

This matter comes before the Court on Plaintiff's Motion for New Trial and Brief in Support Thereof filed September 6, 1994 (Docket Entry #60) and Defendant's Brief in Opposition to Plaintiff's Motion for New Trial filed September 21, 1994 (Docket Entry #64).

On June 18, 1993, Plaintiff Joseph J. Garber ("Garber"), a former deputy sheriff of Rogers County, Oklahoma, commenced this action for money damages against the Defendant Dewey "Buck" Johnson ("Johnson"), individually and as Sheriff of Rogers County, Oklahoma, arising out of the suspension of Plaintiff as a deputy sheriff on September 24, 1992 and the discharge from that employment on November 4, 1992. Garber claimed Johnson violated his rights under the United States Constitution pertaining to the First Amendment right to free speech and/or association in connection with his suspension and discharge and that Johnson wrongfully discharged Garber in violation of the public policy of the Constitution of the State of Oklahoma.

On August 19, 1994 after the presentation of evidence and receiving instructions on the law, a jury found in favor of Garber on his claims but awarded "zero" damages. Subsequently, on August 26, 1994, a Judgment was entered in this case reflected the jury's verdict.

Garber now requests that this Court grant him a new trial on the issue of damages, alleging that the award of no damages is contrary to the law and evidence presented at trial. In the alternative, Garber requests a new trial on all matters, including liability.

A court, in its discretion, is empowered to grant a party a new trial. Fed. R. Civ. P. 59(a); Community National Life Ins. Co. v. Parker Square Savings & Loan Ass'n, 406 F.2d 603 (10th Cir. 1969). A motion for new trial "is generally not regarded with favor." United States v. Perea, 458 F.2d 535, 536 (10th Cir. 1972). A new trial cannot be granted merely because the court or a different jury would have weighed the evidence differently and reached a different conclusion. See, Markovich v. Bell Helicopter Textron, Inc., 805 F.Supp. 1231, 1235 (E.D. Pa. 1992) aff'd, 977 F.2d 568 (3rd Cir. 1992). With regard to a damage award in particular, ". . .absent an award so excessive or inadequate as to shock the judicial conscience and to raise an irresistible inference that passion, prejudice, corruption or other improper cause invaded the trial, the jury's determination of the fact is considered inviolate." Barnes v. Smith, 305 F.2d 226, 228 (10th Cir. 1962).

Garber urges that the award of no damages is so "shocking" as to call the verdict into question. This Court disagrees. Ample evidence was presented to support the a finding by the jury that Garber was terminated for his activities but suffered no damage as a result. Further, Garber's suggestion that the jury acted contrary to the Court's instructions is simply without foundation. The instructions provided to the jury and agreed to by the parties did not require an award of damages, but rather only mandated such an award if properly supported by the evidence. Accordingly, Garber is not entitled to a new trial on the damage issue.

Alternatively, Garber also requests a new trial on all issues. Nothing in the record suggests that the jury acted with improvidence or contrary to the evidence and law. Therefore, Garber's request in this regard is also without merit.

IT IS THEREFORE ORDERED THAT the Plaintiff's Motion for New Trial filed September 6, 1994 (Docket Entry #60) is hereby DENIED.

IT IS SO ORDERED this 22 day of March, 1995.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE MAR 2 3 1995

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN RE: COOPER MANUFACTURING CORP., and its Affiliates; CHALLENGER RIG & MANUFACTURING, INC.; COOPER OFFSHORE SYSTEMS, INC.; and COOPER SALES CORP.,	)	Case No. 84-01061-W (Chapter 11)
Debtors,	)	Adversary No. 94-0282-W
JON A. BARTON, Liquidating Trustee,	)	
Plaintiff,	)	
v.	)	Case No. 94-C-901-BU
THE HOME INDEMNITY COMPANY; THE CONTINENTAL INSURANCE COMPANY; HARBOR INSURANCE COMPANY; and GREENWICH INSURANCE COMPANY,	)	
Defendants.	)	

FILED

MAR 22 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER WITHDRAWING THE REFERENCE

This matter comes before the Court on the Request for Withdrawal of Reference of Proceeding to the District Court and for Determination that Proceeding is Non-Core filed by Defendants Continental Insurance Company and Greenwich Insurance Company on September 23, 1994 (Docket Entry #1); The Home Indemnity Company's Request for Withdrawal of Reference of Proceeding to the District Court and for Determination That Proceeding is Non-Core filed October 5, 1994 (Docket Entry #4); Plaintiff's Objection to Defendants' Request filed October 24, 1994 (Docket Entry #12); and Defendants' Replies to Plaintiff's Objection filed November 7 and 9, 1994 (Docket Entry #13 and #14).

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Plaintiff commenced the underlying adversary proceeding in the United States Bankruptcy Court for the Northern District of Oklahoma (the "Bankruptcy Court") on September 12, 1994, alleging that the Defendants failed to pay pursuant to an insurance contract and breached their obligation to deal with the Plaintiff in good faith in the consideration of its insurance claims.[1] Plaintiff alleges that prior to the filing of the petition in bankruptcy, the Debtors were in the business of manufacturing workover rigs. Numerous claims and lawsuits were filed against the Debtors seeking to recover for damages allegedly arising from the use of allegedly defective rigs manufactured by the Debtors. Consequently, the Debtors sought relief under the Bankruptcy Code.

Plaintiff further alleges that the Defendants issued insurance policies to the Debtors, pre-petition which remained in effect post-petition. These policies allegedly obligates the Defendants to investigate, defend and indemnify the Debtors with respect to the aforementioned claims for the defective rigs. Although Debtors allegedly abided by the terms of the policies on these claims, the Defendants have failed to pay on the claims in accordance with their obligations under the policies.

Defendants now request that this Court withdraw the reference to the Bankruptcy Court since:

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[1] The bankruptcy Debtors filed a voluntary petition seeking relief under Chapter 11 of the United States Bankruptcy Code on July 13, 1984. By Order entered December 4, 1985, the Bankruptcy Court confirmed the Debtors' plan of reorganization, whereby a liquidating trust was created. By Order entered January 29, 1986, Jon Barton was appointed Liquidating Trustee over the trust. It is in this capacity that the Plaintiff gains the appropriate standing to initiate this proceeding. See Adversary Complaint filed September 12, 1994.

1) the proceeding is non-core and therefore the Bankruptcy Court lacks the requisite jurisdiction to preside over the adversary action; and

2) Defendants are entitled to a jury trial on the claims at issue and the Bankruptcy Court lacks the authority to conduct jury trials.

Core/Non-Core Proceeding

Defendants allege that the subject matter at issue in the adversary proceeding is non-core and therefore the Bankruptcy Court lacks jurisdiction over the proceeding. Defendants contend that 28 U.S.C. §157(b)(2)(A) provides that among the items considered core proceedings are matters concerning the administration of the estate, which Plaintiff asserts as the basis for jurisdiction in this case. Since a plan of reorganization was confirmed in this case, Defendants argue that the bankruptcy estate has ceased to exist and therefore estate administration can no longer be the basis for jurisdiction, citing In re Transamerican Natural Gas Corp., 127 Bankr. 800 (Bankr. S.D. Tx. 1991).

Although the bankruptcy estate established with the filing of the petition may no longer exist, a bankruptcy debtor can, in essence, preserve the actions arising from the estate's administration through a confirmed plan of reorganization by designating the action in the plan and provide for the appointment of a representative of the estate. See 11 U.S.C. §1123(b)(3)(B). Since the Defendants have failed to challenge the Plaintiff's standing or the propriety of the preservation of the action in either the request to withdraw the reference or the pending motions

to dismiss, this Court must conclude that the present adversary action is properly maintained.

Further, Plaintiff's reliance upon the Transamerican case is misplaced. In that case, the alleged claim did not arise until post-confirmation of a plan of reorganization and therefore had no relation to the pre-confirmation bankruptcy estate whatsoever. Such is not the case in the Plaintiff's action. The claims arose prior to confirmation and indeed the Plaintiff alleges was one of the factors for the filing of the bankruptcy from the outset. As a result, this Court finds that the pending action has sufficient relationship to a matter concerning the administration of the bankruptcy estate to be considered core for jurisdictional purposes. See, In re Baltimore Motor Coach Co., 103 Bankr. 103 (Bankr. D. Md. 1989).

Right to Jury Trial

Defendants assert that they are entitled to a jury trial on the claims against them and since the Bankruptcy Court is not empowered to conduct such trials, withdrawal of the reference is appropriate. Plaintiff does not challenge Defendants' right to a jury trial, but instead encourages this Court to refrain from withdrawing the reference until such time as the matter is ready for trial. The purpose for the delay would be to allow the Bankruptcy Court to handle all preliminary matters to permit the Bankruptcy Court to exercise its "knowledge and expertise in dealing with the bankruptcy aspects of the case. . ."[2]

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[2] See, Plaintiff's Objection to Defendants' Request for Withdrawal of Reference filed October 24, 1994 at p. 10, citing Barlow & Peek, Inc. v. Manke Truck Lines, Inc., 163 Bankr. 177, 179

Plaintiff cites cases wherein the District Court permitted the Bankruptcy Court to consider all pre-trial matters short of the jury trial and submit proposed findings of fact and conclusions of law on dispositive matters. See, Barlow & Peek, supra; In re Nady, 138 Bankr. 608 (Bankr. D. Nev. 1992). Since the subject matter of the pending adversary proceeding is in the nature of a breach of an insurance contract and bad faith non-payment of an insurance claim, the application of the facts of the underlying bankruptcy and of bankruptcy law is minimal. Accordingly, no justification exists to forestall withdrawal of the reference when eventually it is clear that withdrawal will be necessary for the conducting of a jury trial.[3] As a result, Defendants' request to withdraw the reference for the purpose of conducting a jury trial shall be granted.

IT IS THEREFORE ORDERED THAT the Request for Withdrawal of Reference of Proceeding to the District Court and for Determination that Proceeding is Non-Core filed by Defendants Continental Insurance Company and Greenwich Insurance Company on September 23, 1994 (Docket Entry #1) and The Home Indemnity Company's Request for Withdrawal of Reference of Proceeding to the District Court and for Determination That Proceeding is Non-Core filed October 5, 1994 (Docket Entry #4) are hereby **GRANTED**.

(Bankr. D. Nev. 1993).

[3] It is well-settled law that the Bankruptcy Court lacks the requisite authority to conduct jury trials. In re Kaiser Steel Corp., 911 F.2d 380 (10th Cir. 1990). This Court is aware of the Bankruptcy Reform Act of 1994 which provides for the bankruptcy court to conduct jury trials under certain limited conditions and circumstances. However, this law was not in effect at the time of the filing of the Debtors' bankruptcy case and therefore is inapplicable to the instant case.

IT IS SO ORDERED this 22nd day of March, 1995.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

PEDDINGHAUS CORPORATION

Plaintiff,

vs.

WILLIAM H. NOBLE d/b/a
BUILDERS STEEL COMPANY

Defendant.

No. 95-C-53-K

O R D E R

Now before the court is Defendant's Motion to Dismiss for Plaintiff's failure to timely serve. Plaintiff commenced this action by filing its Complaint in the Circuit Court of the Twenty-First Judicial Circuit, Kankakee County, State of Illinois on May 1, 1994. Defendant timely filed its Notice of Removal to the United States District Court for the Central District of Illinois. Defendant also filed its Motion to Dismiss for lack of *in personam* jurisdiction, insufficiency of service of process and lack of venue. On October 13, 1994, U.S. Magistrate Judge Robert J. Kauffman of the Central District of Illinois, entered his Report and Recommendation, recommending that the case be transferred to the United States District Court for the Northern District of Oklahoma. The Report and Recommendation also stated plaintiffs should re-serve the defendant, based on the unrefuted affidavit of the defendant that service was improper because a summons had not

accompanied the petition.[1]

On January 12, 1995, the Report and Recommendation of the Magistrate Judge was accepted by Harold A. Baker, Senior United States District Judge for the Central District of Illinois. Notice of the case being transferred to this court was received on January 23, 1995. On February 21, 1995, Defendant filed this Motion to Dismiss for failure of Plaintiff to timely serve. As of this date, Plaintiff has failed to respond to Defendant's motion.

Local Rule 7.1(c) of the United States District Court for the Northern District of Oklahoma states:

> Response briefs shall be filed within fifteen (15) days after the filing of the motion. Failure to timely respond will authorize the court, in its discretion, to deem the matter confessed, and enter the relief requested.

Defendant, in his motion to dismiss, alleges that since more than 120 days have passed since Plaintiff filed its complaint in this action and furthermore that more than 120 days have passed since the Magistrate Judge has entered his Report and Recommendation advising that Plaintiff re-serve the Defendant, this court, in its discretion, should dismiss this action pursuant to Rule 4(m) of the Federal Rules of Civil Procedure.

Rule 4(m) states in part:

> If service of the summons and complaint is not made upon the defendant within 120 days after the filing of the complaint, the court upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action

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[1]The transferring court need not have personal jurisdiction over the defendant to order such a transfer. Cote v. Wadel, 796 F.2d 981, 985 (7th Cir.1986).

> without prejudice as to that defendant or direct that service be effected within a specific time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period.

Plaintiff has not shown this court any reason for its failure to properly serve Defendant, much less a good cause for its failure, by failing to respond to Defendant's motion.

It is the order of the court that the motion of the defendant to Dismiss is hereby GRANTED. This action is dismissed without prejudice.

ORDERED this 20 day of March, 1995.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

CLARE DAVIDSON SCHACHTER, as Personal Representative of the Estate of BARBARA JEAN DAVIDSON, Deceased, and CLARE DAVIDSON SCHACHTER, Individually, for and on behalf of Clare Davidson Schachter, Jack Davidson, and Jill Davidson Rooney, as surviving children of BARBARA JEAN DAVIDSON, Deceased,

Plaintiff,

vs.

PACIFICARE OF OKLAHOMA, INC., an Oklahoma corporation, and RAYBURNE W. GOEN, M.D., Individually, and THE WHEELING MEDICAL GROUP, an Oklahoma Corporation, (now known as WHEELING/OMNI, INC.),

Defendants.

Case No. 94-C-203-BU

ORDER

This matter comes before the Court upon Defendant PacifiCare of Oklahoma, Inc.'s Motion to Stay Remand and Amend Order Pursuant to 28 U.S.C. § 1292(b) (Docket No. 74). Plaintiff has responded to the motion and Defendant has replied thereto. Because the Court finds that an interlocutory appeal from the Court's Order of March 15, 1995 granting in part and denying in part Defendant's summary judgment motion would not materially advance the ultimate termination of this litigation and that a stay of the remand to the state court would be prejudicial to Plaintiff, the Court hereby DENIES Defendant's Motion.

ENTERED this 21st day of March, 1995.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

BRIAN STANBERRY,

Plaintiff,

v.

L.L. YOUNG and the ATTORNEY GENERAL OF THE STATE OF OKLAHOMA,

Defendants.

Case No. 94-C-99-B

ORDER

The court has for consideration the Report and Recommendation of the Magistrate Judge filed February 10, 1995, in which the Magistrate Judge recommended that the Petitioner's Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (Docket #1)[1] be dismissed for failure to exhaust state remedies. No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

After careful consideration of the record and the issues, the court has concluded that the Report and Recommendation of the Magistrate Judge should be and hereby is affirmed.

IT IS THEREFORE ORDERED that the Petitioner's Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (Docket #1) is dismissed for failure to exhaust state remedies.

Dated this 21st day of Mar., 1995.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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[1] "Docket numbers" refer to numerical designations assigned sequentially to each pleading, motion, order, or other filing and are included for purposes of record keeping only. "Docket numbers" have no independent legal significance and are to be used in conjunction with the docket sheet prepared and maintained by the United States Court Clerk, Northern District of Oklahoma.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

NELSON BROWN,)
)
Plaintiff,)
)
vs.) Case No. 94-C-121-B
)
RON CHAMPION, et al.,)
)
Defendants.)

J U D G M E N T

In accord with the Order filed this date sustaining the Defendants' Motion for Summary Judgment, the Court hereby enters judgment in favor of the Defendant, Ron Champion, et al., and against the Plaintiff, Nelson Brown. Plaintiff shall take nothing of his claim. Each party is to pay its respective attorney's fees.

Dated, this 21st day of March, 1995.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

NELSON BROWN,)
)
Plaintiff,)
)
vs.) Case No. 94-C-121-B
)
RON CHAMPION, et al.,)
)
Defendants.)

O R D E R

Before the Court for consideration is the Report and Recommendation of United States Magistrate Judge regarding Respondents' Summary Judgment Motion (Docket #14) and Respondents' Objection to the Report and Recommendation (Docket #16). The Court also considers Petitioner's motion for punitive or compensatory damages (Docket #15) and request for a jury trial (Docket #17).

Brown is an inmate at Dick Conner Correctional Center who was punished by prison officials for allegedly telling a fellow inmate, "I'll take care of you after count." Brown was found guilty of misconduct after a June 10, 1993, disciplinary hearing and given 10 days of disciplinary segregation. As part of his punishment, Brown was reduced from Class IV status[1] to Class I status.[2]

Brown filed an administrative appeal of the punishment on June 15, 1993. On June 28, 1993, the Warden expunged the misconduct

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[1]Class IV inmates can accrue 44 "earned credits" per month. *See* 57 O.S. § 138(D).

[2]Class I prisoners receive no earned credits.

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charge because prison officials had exceeded the time for responding to appeals (Exhibit H to Defendants' Motion for Summary Judgment). As a result of the expungement, Brown was assigned to Class II level on July 1, 1993.[3] Brown was returned to Class IV level on August 1, 1993.

On February 11, 1994, Brown filed this case, alleging that prison officials improperly demoted him from Class IV status. He also claims that prison officials illegally arrested him, and that prison officials violated his eighth amendment rights by inflicting cruel and unusual punishment. The Magistrate Judge decided to treat Brown's Complaint as a Petition for Writ for Habeas Corpus to the extent that Brown requests restoration of 60 credit days, and as a § 1983 claim to the extent that he seeks $300,000 in monetary damages. The Magistrate Judge recommends that Brown be restored 53 credit days, those days that he would have earned had he remained at Class IV status.[4] The Magistrate Judge reasons that Brown was denied due process because expungement of the misconduct charge on procedural grounds, while leaving "the 'punishment', *e.g.*, the loss of Brown's earned credits," was "tantamount to the Warden reversing the disciplinary sanction for lack of evidence." (*See* the Report and Recommendation of the U.S. Magistrate Judge, p. 7).

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[3]Class II prisoners earn 22 credits per month.

[4]The Magistrate Judge correctly calculates that, had Brown continued to hold Class IV status, he would have received a total of 88 credits in June and July, 1994. Instead, the reduction in class due to the disciplinary action left him with 13 days in June and 22 days in July--a total of 53 fewer credits than he would have earned at Class IV.

The first issue is whether Brown's Complaint was properly converted into a habeas corpus petition by the Magistrate Judge. The Court concludes that the Magistrate Judge was correct in doing so. *See* Preiser v. Rodriguez, 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973) ("When a state prisoner is challenging the ... duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to ... a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus."). Habeas corpus is the proper remedy for the withholding of time credits if it affects the length of confinement, as is the case here. Gregory v. Wyse, 512 F.2d 378, 381 (10th Cir. 1975).

The next question is whether Brown is required to exhaust his state remedies before filing this action.[5] A petitioner is not required to exhaust when there are no available state remedies. *See* 28 U.S.C. § 2254. Defendants argue that Brown has two potential state-law remedies that he has not exhausted: writs of mandamus and habeas corpus. (Defendants' Objection, p. 3).

The Court disagrees. The Tenth Circuit has held that the state of Oklahoma does not provide a state remedy to challenge the calculation of earned credits. Wallace v. Cody, 951 F.2d 1170, 1172 (10th Cir. 1991). The Oklahoma Court of Criminal Appeals held that mandamus will not issue unless a petitioner can show (1) a

[5]The Magistrate Judge held that the Defendants had waived any exhaustion claim by not raising it in their brief. However, since the exhaustion issue arose only when the Complaint was converted into a habeas corpus petition by the Magistrate Judge, the Court does consider the Defendants' exhaustion argument, made in their Objection to the Magistrate Judge's Report and Recommendation.

clear legal right; (2) the respondent's refusal to perform a plain legal duty not involving the exercise of discretion; and (3) the adequacy of mandamus and the inadequacy of other relief. Canady v. Reynolds, 880 P.2d 391, 396 (Okla. Crim. App. 1994). The Canady court held that the second prong of this test is not met in cases concerning calculation of earned credits. "[T]he actual granting or revoking of credits must of necessity involve some discretion; *e.g.*, determining how many and what type of infractions result in a change of status which could affect the number of credits earned." Id. at 397. Instead, the Canady court held, a petitioner's state-law remedy in earned credits cases is a writ of habeas corpus.

In this case, however, a state writ of habeas corpus is unavailable to Brown at this time. In state habeas corpus cases, the petitioner must demonstrate, as a prerequisite, that he would be entitled to immediate release if a writ were granted. Mahler v. State of Oklahoma, 783 P.2d 973 (Okla. Crim. App. 1989). Brown began serving a 20-year sentence on December 18, 1991. In their supplemental brief filed December 15, 1994 (Docket #19), Respondents acknowledge that Brown will not be entitled to immediate release should he receive the time credits he seeks here. Therefore, he is unable to obtain relief via a state habeas corpus petition.[6]

Because state petitions of mandamus and habeas corpus are

[6]However, there is no such "immediate release" requirement before a federal habeas corpus writ can issue.

unavailable to Brown in this case, the Court holds that requiring exhaustion of remedies would be futile. Therefore, the Court will consider Brown's habeas corpus claim.

The parties do not dispute that Brown still retains all the good-time credits earned prior to the misconduct at issue in this case. Moreover, Brown has not sued for restitution of any of good-time credits previously earned. Rather, Brown's real complaint is that he was unable to continue to accumulate good-time credits at the rate of 44 credits per month from June 10 through July 31, 1993, because prison officials reduced his class status from a IV to a I. Prison policy states, however, that every prisoner placed in disciplinary segregation will be reclassified to Class I status.[7]

In Wolff v. McDonnell, 418 U.S. 539, 556-57 (1974), the U.S. Supreme Court held that the Due Process Clause alone does not create a liberty interest in good-time credits. The Wolff court recognized, however, that once a state creates a right to good-time credits, the Due Process Clause protects this right from being arbitrarily abrogated. Id. at 557. The principal issue in this case is, therefore, whether Oklahoma law creates a right or justifiable expectation to good-time credits unearned due to disciplinary segregation.

To establish a liberty interest deriving from state law, a

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[7]DOC Policy OP-060213, Section II(A)(7), mandates that every prisoner placed in disciplinary segregation will be reclassified to Class I. *See* Defendant's Supplement to the Record, filed March 9, 1995, at pp. 2-3.

prisoner must show

> 'that particularized standards or criteria guide the State's decision makers.' If the decision maker is 'not required to base its decisions on objective and defined criteria,' but instead 'can deny the requested relief for any constitutionally permissible reason or for no reason at all,' . . . the State has not created a constitutionally protected liberty interest.

Olim v. Wakinekona, 461 U.S. 238, 249 (1983) (citations omitted).

Brown alleges no law or facts that suggest the basis for any reasonable expectation on his part of a right to unearned good-time credits. Nor has the Court found any. On the contrary, DOC Policy OP-060211 specifically provides that credits unearned due to disciplinary service or loss of job will not be subject to restoration.[8] Accordingly, the Court concludes that the DOC procedure in effect at the time of the misconduct at issue does not contain any mandatory language or specific directive that if a misconduct is overturned, an inmate shall be entitled to good-time credits unearned as a result of the disciplinary action.[9] Because

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[8]Section IV.C. of the policy states that "[a]fter July 11, 1984, if a misconduct which had resulted in the loss of *earned* credit was reversed and expunged, only earned credit which had been taken as the result of the misconduct may be restored. Credit unearned due to disciplinary service or loss of job will not be subject to restoration" [emphasis added]. *See* Defendant's Supplement to the Record, filed March 9, 1995, at pp. 30-31.

[9]Brown alleges that Respondents have provided to the Court policies that were not in effect at the time this case was filed. As support for this contention, he provides Addendum-02 in his Supplemental Response filed March 15, 1995. However, the Court notes this Addendum is irrelevent for two reasons: it deals only with earned credits instead of the right to earn future credits, and it deals only with exceptions to the policy that assignment to a class level will be effective the first day of the following month.

no statute or DOC policy created a liberty interest in unearned credits, Respondents did not, as a matter of law, violate Brown's due process rights in declining to restore his unearned credits. Brown's request for habeas corpus relief must therefore be denied.

The Court now turns to Brown's civil rights claims. In addition to restoration of his unearned good-time credits, Brown seeks compensatory and punitive damages from the Defendants, in their individual capacities, for violation of his eighth and fourteenth amendment rights pursuant to 42 U.S.C. § 1983.[10] Brown also seeks damages for the "warrantless arrest . . . on 6/4/93 when R/O caused incident report to be filed." (*See* Complaint, Doc. #1).

At the outset, the Court notes that, although Brown alleges violations of his eighth amendment rights, he has set forth no factual allegations which, in the Court's view, establish an eighth amendment claim under the Cruel and Unusual Punishment Clause. *See* Farmer v. Brennan, 114 S.Ct. 1970, 1977 (1994). As Brown's contentions under the Eighth Amendment lack any merit, the Court must analyze his remaining claims under the Fourteenth Amendment.

When an inmate has served a punitive sentence after a disciplinary hearing, as Brown has done in this case, prison officials must respond in damages (absent the successful interposition of a qualified immunity defense) if they have

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[10]Because state officers in their official capacity are not "persons" subject to suit under section 1983, Brown's claim for money damages against the Defendants in their official capacity must fail and the Report of the Magistrate Judge is sustained in this respect.

deprived the inmate of his procedural due process rights at the disciplinary hearing. Walker v. Bates, 23 F.3d 652, 658-59 (2nd Cir. 1994), *petition for cert. filed*, 63 U.S.L.W. 3092 (U.S. Jul. 25, 1994). The primary issue is, therefore, whether Defendants deprived Brown of his due process rights during the prison disciplinary hearing.

A court's review of a prison disciplinary hearing, even when it results in a loss of good-time credits and administrative segregation, is quite limited. The minimum due process requirements for prison disciplinary hearings are: (1) written notice of the charges brought against the inmate at least twenty-four hours before the hearing; (2) the opportunity to call witnesses and present evidence at the hearing; and (3) a written statement by the fact-finder as to the evidence relied upon and the reason for any action taken. Id. Once an inmate receives this due process, the Supreme Court has instructed in Superintendent v. Hill, 472 U.S. 445, 454-55 (1985), that the findings of the prison disciplinary board need only be supported by "some evidence in the record."

Brown does not dispute that he was provided the initial due process required by Wolff prior to serving his ten days in punitive segregation.[11] Accordingly, the Court concludes that Defendants

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[11]*Cf.* Walker, 23 F.3d at 658-59 (inmate who had commenced serving his punitive sentence stated a claim for due process violation by contending that hearing officer had denied his request for witnesses without a finding that their testimony would be immaterial or redundant or that institutional safety or correctional goals would be jeopardized by their presence); Traylor v. Denton, 39 F.3d 1193, (10th Cir. 1994) (unpublished opinion) (inference that disciplinary officer was biased against the inmate

did not deprive Brown of any constitutionally protected procedural rights at the disciplinary hearing and the fact that his misconduct was expunged, on procedural grounds, does not suffice to establish a due process violation.

Even if Brown had challenged the findings of the disciplinary officer, the Court concludes that there was sufficient evidence to support the conclusion of the disciplinary officer that Brown was guilty of "Menacing Threats of Bodily Harm of Death to Another Person." Although the disciplinary action was based solely on the statement of Stephanie White, Brown's case manager,[12] the "some evidence" standard does not require proof with certainty, proof beyond a reasonable doubt, or even proof by a preponderance of the evidence. Hill, 472 U.S. at 455-56. The only proof required is "any evidence in the record that could support the conclusion reached by the disciplinary board." Id.

Accordingly, Defendants are entitled to judgment as a matter of law on Plaintiff's fourteenth amendment claims under 42 U.S.C. § 1983. Because the Court finds, as a matter of law, that Defendants did not violate Brown's civil rights, Brown's motion for punitive or compensatory damages (Docket #15) is denied.

The Court hereby adopts and affirms the Report and

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before the disciplinary hearing began raised genuine issues of material fact as to violation of his due process rights, although the inmate's discipline was reversed on administrative appeal after the inmate already had served his disciplinary segregation).

[12]White testified at the disciplinary hearing that she observed Brown "make a confrontative posture" toward inmate Hood and "state in a hostile tone of voice: I'll take care of you after count."

Recommendation of the U.S. Magistrate Judge that summary judgment be granted in favor of Defendants as to Brown's civil rights claims. As to the petition for writ of habeas corpus, the Court hereby sustains Defendants' objection to the Report and Recommendation. Further, the Court finds that summary judgment in favor of Defendants should be and is hereby granted on Brown's habeas corpus claim. This Order renders moot Brown's second motion for a jury trial (Docket #17).

IT IS SO ORDERED THIS 21 DAY OF MARCH, 1995.

Thomas R. Brett

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MELTON PIETROWSKI,

Plaintiff,

vs.

RON CHAMPION, et al.,

Defendants.

Case No. 94-C-733-B

JUDGMENT

In accord with the Order filed this date sustaining the Defendants' Motion for Summary Judgment, the Court hereby enters judgment in favor of the Defendant, Ron Champion, et al., and against the Plaintiff, Melton Pietrowski. Plaintiff shall take nothing of his claim. Each party is to pay its respective attorney's fees.

Dated, this 21st day of March, 1995.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MELTON PIETROWSKI,)
)
Plaintiff,)
)
vs.) Case No. 94-C-733-B
)
RON CHAMPION, et al.,)
)
Defendants.)

O R D E R

Before the Court for consideration are a Motion for Summary Judgment (Docket #4) filed by Defendants Ron Champion, et al., and a Cross-Motion for Summary Judgment (Docket #8) filed by Plaintiff Melton Pietrowski.

Pietrowski, an inmate at the Dick Conner Correctional Center ("DCCC"), alleges that his thirteenth and fourteenth amendment rights were violated because the Defendants forced him to work in the DCCC kitchen from September 13 to November 30, 1993.[1] He also alleges that his first, thirteenth and fourteenth amendment rights were violated because DCCC officials deprived him of access to the law library, and forced him to work in the DCCC kitchen during the hours in which the law library was open. This, Pietrowski alleges, rendered him unable to prepare for his parole revocation hearing.

[1]During this time, Pietrowski was incarcerated at DCCC awaiting an executive parole revocation hearing. A hearing held on July 23, 1993, found probable cause to detain Pietrowski pending the parole revocation hearing.

He also alleges a violation of his fourth and fourteenth amendment rights because Defendants invaded his privacy and defamed him. Pietrowski contends that he was still on parole while awaiting the revocation hearing; therefore, he was entitled to the rights afforded a pretrial detainee.

I. STATEMENT OF UNDISPUTED FACTS

1. Pietrowski was convicted of Murder in 1970 and sentenced to life in prison (Report, Attachment A).

2. Pietrowski was paroled on July 29, 1988 (Report, Attachments A and C).

3. On July 23, 1993, Pietrowski received a probable cause hearing after it was alleged that he had violated the following conditions of his parole: (1) failure to immediately report any new arrests to his parole officer; (2) violating state law by being charged with Feloniously Pointing a Firearm and Driving Under the Influence; and (3) failing to refrain from the possession or use of firearms (Report, Attachment C).

4. The Hearing Officer found that there was probable cause to believe that Pietrowski had violated the conditions of his parole, and an executive hearing was scheduled. Id.

5. Pietrowski was returned to prison on August 26, 1993, at the Lexington Assessment and Reception Center (Report, Attachments A and B).

6. On September 9, 1993, Pietrowski was transferred to DCCC (Report, Attachment A).

7. On November 4, 1993, Pietrowski received an Executive Parole Revocation Hearing, during which evidence was presented that: (1) Pietrowski had been arrested on May 19, 1993, but had not reported the arrest until May 31, 1993, (2) Pietrowski was arrested on May 19, 1993, for Driving Under the Influence, and was arrested on July 9, 1993, for Feloniously Pointing a Firearm[2] (Report, Attachment C).

8. Based on the evidence presented at the Executive Parole Revocation Hearing, the Hearing Officer held that Pietrowski had violated the conditions of his parole and recommended that his parole be revoked. Id.

9. Pietrowski's parole was revoked by the Governor of Oklahoma on December 23, 1993 (Report, Attachment D).

II. STANDARD OF REVIEW

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Windon Third Oil & Gas v. FDIC, 805 F.2d 342 (10th Cir. 1986). In Celotex, the court stated:

> The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to

[2]This charge later was amended to Assault with a Deadly Weapon.

> establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 317 (1986). To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986). The evidence and inferences therefrom must be viewed in a light most favorable to the nonmoving party. Conaway v. Smith, 853 F.2d 789, 792 n. 4 (10th Cir. 1988). Unless the Defendants can demonstrate their entitlement beyond a reasonable doubt, summary judgment must be denied. Norton v. Liddel, 620 F.2d 1375, 1381 (10th Cir. 1980).

The Tenth Circuit Court of Appeals stated:

> Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." . . . Factual disputes about immaterial matters are irrelevant to a summary judgment determination . . . We view the evidence in a light most favorable to the nonmovant; however, it is not enough that the nonmovant's evidence be "merely colorable" or anything short of "significantly probative."
>
> * * *
>
> A movant is not required to provide evidence negating an opponent's claim . . . [r]ather, the burden is on the nonmovant, who "must present affirmative evidence in order to defeat a properly supported motion for summary judgment." . . . After the nonmovant has had a full opportunity to conduct discovery, this burden falls on the nonmovant even though the evidence probably is in possession of the movant. (Citations omitted.)

Committee for the First Amendment v. Campbell, 962 F.2d 1517, 1521 (10th Cir. 1992).

III. LEGAL ANALYSIS

A. The Martinez Report

When a pro se plaintiff is a prisoner, a court-authorized "Martinez Report" (Report) prepared by prison officials may be necessary to aid the Court in determining possible legal bases for relief for unartfully drawn pro se complaints. *See* Hall v. Bellmon, 935 F.2d 1106, 1109 (10th Cir. 1991). In considering summary judgment motions, the Court may treat the Martinez Report as an affidavit, but may not accept the factual findings of the report if the plaintiff has presented conflicting evidence. Id. at 1111. The Court also must construe plaintiff's pro se pleadings liberally for purposes of summary judgment. Haines v. Kerner, 404 U.S. 519, 520 (1972).

B. Involuntary Servitude

The Court first addresses Pietrowski's claim of involuntary servitude in violation of the thirteenth and fourteenth amendments. He claims he was forced to work in the DCCC kitchen from September 13 to November 30, 1993.[3] He provided a bill to the Warden for his

[3]DCCC policy, implemented on September 10, 1993, requires all new prisoners with medical clearance to work for 60 days in the DCCC kitchen, in order to keep the kitchen adequately staffed (Attachment E to the Report). Further, the Court notes that "[j]ob assignments are matters peculiarly within the discretion of prison officials." Coyle v. Hughs, 436 F.Supp. 591, 593 (W.D.Okla. 1977).

services, charging $10 per hour for his work in the kitchen. He now seeks that amount as damages.

The thirteenth amendment's restriction on involuntary servitude does not apply to prisoners. Ruark v. Solano, 928 F.2d 947 (10th Cir. 1991). Therefore, Pietrowski's claim that his thirteenth amendment rights were violated must fail. Further, an inmate's right to wages for prison work is granted as a privilege and not as a right. Cumbey v. State, 699 P.2d 1094, 1097 (Okla. 1985). "Whatever right [Plaintiff has] to compensation is solely by the grace of the state and governed by rules and regulations promulgated by legislative direction." Id. Therefore, Pietrowski has not been deprived of any property to which he is legally entitled. There is no evidence before the Court, nor does Pietrowski allege, that Defendants violated prison regulations regarding payment for inmate services. The Court determines that there has been no constitutional violation, although Pietrowski was paid less than he felt he deserved.[4]

C. Due Process

Pietrowski alleges that his due process rights were violated by being forced to work in the kitchen before his parole was officially revoked. He alleges that he should have been afforded the same rights and privileges as a pretrial detainee, because he

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[4]Pietrowski was paid in accordance with DOC Policy OP-090102, titled "Inmate Pay Program" (Attachments G and H to the Report).

had not yet been convicted of the offenses underlying the parole revocation. The court has recognized that pretrial detainees retain at least those constitutional rights as those retained by convicted prisoners. However, these rights are not immune from restrictions or limitations pursuant to lawful incarceration. Bell v. Wolfish, 441 U.S. 520, 545 (1979). Detainees do not possess the full range of freedoms as unincarcerated individuals. Id. at 546. Courts must accommodate both the legitimate needs of the institution and the rights of the incarcerated. Id. Courts should ordinarily defer their judgment in the day-to-day operations of a corrections facility to the appropriate officials unless there is substantial evidence that their response is exaggerated. Id. at 546-47. Conditions or restrictions that implicate the detainee's liberty interest are evaluated under the Due Process Clause. Id.

However, the Court disagrees with Pietrowski's characterization of himself as a pretrial detainee. "[R]evocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations." Morrissey v. Brewer, 408 U.S. 471, 480 (1972). The Morrissey court noted that parole revocation based on allegations of subsequent crimes, such as Pietrowski's case here, is common. "Sometimes revocation occurs when the parolee is accused of another crime; it is often preferred to a new prosecution because of the procedural ease of recommitting the individual on the basis of a lesser showing by the State." Id. at 479. Pietrowski worked in the DCCC kitchen pursuant to DCCC

policy, regardless of the fact that he was detained pending revocation of parole.

Due process for parole revocation requires an inquiry as to whether there is probable cause to believe a parolee has committed acts that would constitute a parole violation. Morrissey, 408 U.S. at 482. After such determination, a parolee may be detained and returned to prison pending the final, executive decision regarding revocation. Id. The record reveals that Pietrowski received a probable cause hearing (Report, Attachment C). Pietrowski does not allege that his probable cause hearing was insufficient, nor does he allege that the parole revocation process violated his due process rights. Once Pietrowski was reincarcerated, he was subject to the same policies as were all other DCCC inmates.[5] The Court believes that Pietrowski has failed to prove that his due process rights were violated.

D. Right of Access to the Law Library

Next, Pietrowski alleges that Defendants interfered with his constitutional rights of access to the courts and the DCCC law library, thereby violating his first, thirteenth and fourteenth amendment rights. He alleges that he was forced to work in the DCCC kitchen during the hours that the law library was open, which

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[5]For this reason, Pietrowski's equal protection claim also must fail. He has not alleged that he was singled out for discriminatory treatment based on his membership in a protected class. Castaneda v. Partida, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977). Instead, he alleges that he was subject to discriminatory treatment because he worked the afternoon shift in the DCCC kitchen.

prevented him from adequately preparing for his parole revocation hearing.

A convicted inmate has a constitutional right to adequate access to the courts and the law library. Love v. Summit County, 776 F.2d 908, 912 (10th Cir. 1985), *cert. denied*, 79 U.S. 814 (1986).

> The right is one of the privileges and immunities accorded citizens under article four of the Constitution and the Fourteenth Amendment. It is also one aspect of the First Amendment right to petition the government to redress grievances. Finally the right of access is founded on the due process clause and guarantees the right to present to a court of law allegations concerning the violation of constitutional rights.

Smith v. Maschner, 899 F.2d 940, 947 (10th Cir. 1990) (citation omitted). In Bounds v. Smith, 430 U.S. 817, 827 (1977), the U.S. Supreme Court held that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." The Tenth Circuit and many other Circuits have construed Bounds to require some showing of prejudice or injury--*i.e.*, actual denial of access. *See* Smith v. Maschner, 899 F.2d 940, 944 (10th Cir. 1990) (interference with plaintiff's right to counsel or to access to the courts without more does not give rise to a constitutional violation); Twyman v. Crisp, 584 F.2d 352, 357-58 (10th Cir. 1978) (use of library restricted to two hours a week did not lead to any prejudice, so no denial of access).

DCCC policy states that every inmate not in restrictive

housing will have access to the law library at least six hours per week.[6] Kitchen workers scheduled to work afternoons, as was Pietrowski, are allowed to go to the law library at their request during accessible hours (Attachment K to the Report).[7] Pietrowski alleges, however, that he was not allowed to go to the law library until after his kitchen work was completed.[8] The Report indicates that Pietrowski used the library during his work hours for a total of 25 hours and 27 minutes from September 16 through November 30, 1993 (Attachment M to the Report). Further, Pietrowski's supervisor, Venson Taylor, states in an affidavit that he never prevented Pietrowski from visiting the law library (Attachment J to the Report).

Even if Pietrowski met his burden of showing a denial of access to the law library, this Court concludes that he has not shown any actual injury as a result of the alleged denial he has suffered. Since prejudice is an essential element for maintaining a claim for denial of access to the courts, Twyman v. Crisp, 584 F.2d 352 (10th Cir. 1978), Pietrowski's claim for denial of access

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[6]*See* DOC Policy OP-090115, Section V.A. (Attachment I to the Report, at p. 5).

[7]The law library was open daily from noon until 8:00 p.m., Monday through Friday until October 25, 1993. After that date, the library was open from 1 p.m. to 4 p.m. on Mondays and Wednesdays for the general inmate population, and from noon to 4 p.m., and 5 p.m. to 8 p.m. on Tuesdays, Thursdays, and Fridays for the general inmate population (Attachment L to the Report).

[8]The fact that Pietrowski was not allowed to go to the library at the time he wished to go does not, in the Court's view, amount to a denial of access to the library in contravention of Pietrowski's constitutional rights.

to the law library must fail. Accordingly, Defendants are entitled to judgment as a matter of law on Plaintiff's claims of denial of access to the law library.

E. Invasion of Privacy and Defamation

Defendants also are entitled to judgment as a matter of law as to Pietrowski's third allegation: that his fourth and fourteenth amendment rights were violated because Derendants invaded his privacy and defamed him. Pietrowski has provided no evidence to support this claim, and "conclusory allegations will not suffice". Wise v. Bravo, 666 F.2d 1328, 1333 (10th Cir. 1981).

F. Summary

Because the Court holds as a matter of law that Pietrowski's civil and constitutional rights were not violated, the Court does not reach the issue of qualified immunity. Defendants' Motion for Summary Judgment is hereby granted. Pietrowski's Motion for Summary Judgment is denied.

IT IS SO ORDERED THIS 21st DAY OF MARCH, 1995.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ALMO MUSIC CORPORATION, SWAG SONG MUSIC, INC., TESTATYME MUSIC, BADCO MUSIC, INC., CONTROVERSY MUSIC, and GUNS N' ROSES MUSIC,

Plaintiffs,

VS.

HARD TIMES, INC., JOHN D. LEGGE, AND DANNY R. LEGGE,

Defendants.

CASE NO. 94-C-852-B

O R D E R A N D J U D G M E N T

This matter comes on for consideration of Plaintiffs' Application For Attorney Fees (docket entry # 7) filed on January 17, 1995. The Court notes Defendants have failed to respond to Plaintiffs' Application.

Default Judgment was entered herein against Defendants on January 4, 1995, in the amount of $6,186.09. In such Judgment the Court made a finding that Plaintiffs are entitled to attorney fees pursuant to 17 U.S.C. § 505.

In their Application Plaintiffs seek attorneys fees in the amount of $927.00 which the Court deems reasonable under the record herein.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that Judgment be and the same is hereby entered in favor of Plaintiffs and against Defendants in the amount of $927.00 plus interest from and after this date at the rate of 6.57% per annum until paid.

IT IS SO ORDERED this 21 day of March, 1995.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

EOD 3-22-95

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RUSSELL McINTOSH, Plaintiff, vs. BANCOKLAHOMA MORTGAGE CORP., BRUMBAUGH & FULTON CO., BOATMEN FIRST NATIONAL BANK OF OKLAHOMA, Defendants.	)	CASE NO. 94-C-929-B

FILED
MAR 21 1995
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

ORDER

This matter comes on for consideration of Defendant BancOklahoma Mortgage Corp.'s (BOMC) Motion To Dismiss (docket entry # 14), Boatmen's First National Bank of Oklahoma's (Boatmen's) Motion For Severance (docket entry # 19) and Defendant Brumbaugh & Fulton Co.'s (B & F) Motion To Dismiss (docket entry # 28).

This is a companion case to Marion Parker v. BancOklahoma Mortgage Co., et al, Case No. 92-C-664-B, now settled. Both Parker and the present Plaintiff McIntosh, black males who work as real estate appraisers, allege the defendant bank and mortgage companies in each case continuously denied their respective applications for employment because of their race. In the present case there is no allegation of conspiracy of action among the defendants.

Plaintiff McIntosh attempted to join the Parker case as a party plaintiff but his Motion To Enter Case As Plaintiff was denied by this Court on August 30, 1994, the Court concluding that

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the various claims of Parker and McIntosh involved arguably common issues of law but that "said claims factually arise from separate transactions and occurrences or series of transactions and occurrences." McIntosh filed this action on October 3, 1994.[1]

The Court, as in the Parker case, will grant severances as to any and each of remaining Defendants, whether moved for or not. Plaintiff concurs in the severance. Again, as in the Parker case, the matters will be joined for discovery purposes.

Accordingly, BOMC's Motion to Dismiss, on the issue of misjoinder, is denied. The Court next considers BOMC's issue that Plaintiff failed to state a claim because Plaintiff failed to specify when he contacted BOMC.

To dismiss a complaint and action for failure to state a claim upon which relief can be granted it must appear beyond doubt that Plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41 (1957). Motions to dismiss under Rule 12(b), Fed.R.Civ.P. admit all well-pleaded facts. Jones v. Hopper, 410 F.2d 1323 (10th Cir. 1969), *cert. denied,* 397 U.S. 991 (1970). The allegations of the Complaint must be taken as true and all reasonable inferences from them must be indulged in favor of complainant. Olpin v. Ideal National Ins. Co., 419 F.2d 1250 (10th Cir. 1969), *cert. denied,* 397 U.S. 1074 (1970).

In his Complaint McIntosh alleges that he has made applications for employment to BOMC "since 1985" and that he has

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[1] It is not readily understood why counsel for Plaintiff McIntosh would join various defendants under claims which factually are separate and disparate, absent an allegation of conspiracy of action, in view of the Parker rulings.

"sought and applied on a continuing basis up to and including the present . . . seeking employment as an appraiser for the defendant". The Court concludes Plaintiff's Complaint sufficient states a claim. BOMC's Motion to Dismiss on this issue is also denied.

The Court next considers B & F's Motion To Dismiss. As set forth above, this Defendant's misjoinder issue will be denied because of the Court's severance of all remaining defendants herein. Further B & F's statute of limitation issue is also denied because Plaintiff alleges that he "sought and applied on a continuing basis up to and including the present with Brumbaugh & Fulton requesting an opportunity to be placed on its fee panel to do conventional and other appraisals." B & F also avers that Plaintiff has failed to state a prima facie case under Patterson v. McLean Credit Union, 491 U.S. 164, 109 S.Ct. 2363 (1989). The Court concludes, reading Plaintiff's Complaint in its entirety, that Plaintiff has sufficiently stated a claim. B & F's Motion to Dismiss on these issues will also be denied.

In summary, the Court GRANTS severance to all remaining defendants herein, movants and non-movants alike, except that the matters will be combined for discovery purposes. Further, the Court DENIES Brumbaugh & Fulton's Motion to Dismiss, and DENIES BancOklahoma Mortgage Corp.'s Motion to Dismiss.

IT IS SO ORDERED this 21 day of March, 1995.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

GERALD G. SHELBY, d/b/a PACESETTER BUILDING SERVICES,

Plaintiff,

vs.

NORMANDY APARTMENTS, L.T.D., R.C. CUNNINGHAM, II, et ux. MIDWEST PROPERTY MANAGEMENT CO.,

Defendants,

and

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,

Garnishee.

CASE NO. 95-C-48-B

O R D E R

This matter comes on for consideration of the Motion to Dismiss filed on January 13, 1995, by the United States of America, ex. rel., Department of Housing and Urban Development (HUD), the Garnishee herein. (docket entry # 2). No response has been filed thereto and neither the Plaintiff nor the Defendants have entered an appearance in the present matter.

The United States, as sovereign, is immune from suit except as it consents to be sued. United States v. Sherwood, 312 U.S. 584, 586 (1941). A waiver of sovereign immunity cannot be implied but must be unequivocally expressed. United States v. King, 395 U.S. 1,4 (1969).

A garnishment proceeding to enforce a judgment debt is an

ancillary legal proceeding against the third-party garnishee and must be brought where jurisdiction can be obtained over the third-party. Harris v. Balk, 198 U.S. 215, 226, 25 S.Ct. 625, 628, 49 L.Ed. 1023 (1905). No legal proceeding, including a garnishment, may be brought against the United States absent a waiver of its sovereign immunity. Millard v. United States, 916 F.2d 1, 3 (Fed.Cir. 1990) and DeTienne v. DeTienne, 815 F.Supp. 394, 395 (D.Kan.1993). See also, 12 O.S. § 1186, and Landman v. DuBois, 133 P.2d 193, 194 (Okla. 1942) (as a general proposition the government of the United States and officers and agents thereof are exempt from the process of garnishment).

The United States has waived its sovereign immunity from garnishment proceedings in certain circumstances. See 42 U.S.C. § 659 which waives sovereign immunity from garnishment for the purpose of child support and alimony, and 5 U.S.C. § 5520 which waives immunity in certain other instances relating to the pay of federal employees.

The garnishment proceeding at issue does not involve alimony or child support. Moreover, the pay of a federal employee is not involved.

On or about September 19, 1994 HUD entered into a Housing Assistance Payment Contract (HAP) with Normandy Apartments, Ltd., a Defendant named herein. Under the terms of the agreement HUD makes payments to Normandy as rent assistance on behalf of eligible tenants. Normandy has received a HUD § 221(d)(3)(c) insured loan and is the recipient of the Section 8 loan management set aside payments specified in the HAP contract. None of the named

defendants are employees of HUD. See Exhibit 1, attached to the Government's motion.

To dismiss a complaint and action for failure to state a claim upon which relief can be granted it must appear beyond doubt that Plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41 (1957). Motions to dismiss under Rule 12(b), Fed.R.Civ.P. admit all well-pleaded facts. Jones v. Hopper, 410 F.2d 1323 (10th Cir. 1969), *cert. denied,* 397 U.S. 991 (1970). The allegations of the Complaint must be taken as true and all reasonable inferences from them must be indulged in favor of complainant. Olpin v. Ideal National Ins. Co., 419 F.2d 1250 (10th Cir. 1969), *cert. denied,* 397 U.S. 1074 (1970).

The Court concludes the United States' Motion to Dismiss should be and the same is hereby GRANTED.

IT IS SO ORDERED this 21 day of March, 1995.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

WILLIAM NARSELLA JOHNSON and SALLY ANN PIERCE-JOHNSON,

Plaintiffs,

vs.

DEPARTMENT OF HUMAN SERVICES, et al.,

Defendants.

Case No. 94-C-518-B

J U D G M E N T

In accord with the Order filed this date sustaining the Defendant's Motion for Summary Judgment, the Court hereby enters judgment in favor of the Defendant, Department of Human Services, et al., and against the Plaintiff, William Narsella Johnson. Plaintiff shall take nothing of his claim. Each party is to pay its respective attorney's fees.

Dated, this 21st day of March, 1995.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

WILLIAM NARSELLA JOHNSON and SALLY ANN PIERCE-JOHNSON,

Plaintiffs,

vs.

DEPARTMENT OF HUMAN SERVICES, et al.,

Defendants.

Case No. 94-C-518-B

O R D E R

Before the Court for consideration is a Motion for Summary Judgment (Docket #10) filed by Defendant Department of Human Services, et al., ("DHS"). Plaintiff William Narsella Johnson ("Johnson") alleges in his Complaint that DHS violated his civil rights pursuant to 42 U.S.C. § 1983 because he was denied an appeal from a state child custody case, and because there was insufficient evidence in the custody case to indicate abuse.[1] He also alleges a denial of due process and equal protection, in violation of the Fifth and Fourteenth Amendments. Further, he alleges that DHS violated the civil rights of his wife, Sally Ann Pierce-Johnson ("Pierce-Johnson"), apparently because a witness against her in the custody proceedings was not subject to cross-examination. Plaintiffs seek a declaratory judgment as to their "rights", injunctive relief to prevent DHS from taking the children from

[1]This allegation was first raised in Johnson's Response to Defendant's Motion for Summary Judgment. His Complaint alleges only the violation of Pierce-Johnson's rights.

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Pierce-Johnson, and prohibit "further harassment and denial[] of benefits". Pierce-Johnson also requests $1 million in damages.

I. UNDISPUTED FACTS

The following facts are undisputed in the record and were not controverted by Plaintiffs in the Response to Motion for Summary Judgment:

1. On January 14, 1992, the Tulsa County District Attorney filed an Information charging Johnson with Injury to Minor Child, in Case No. CF-92-196. (Defendant's Exh. 1).

2. On January 23, 1992, a petition was filed in Tulsa County District Court, Juvenile Division, Case No. JVD-92-12, alleging that Derrico and Deandrea Johnson, the children of Johnson and Pierce-Johnson, were deprived children. The Petition alleged that Johnson had punished Derrico Johnson by inflicting burns and beatings, and by depriving him of water. The Petition further alleged that Pierce-Johnson had failed to protect Derrico from Johnson. (Defendant's Exh. 2).

3. The Juvenile Court petition later was amended to include a prayer for termination of Johnson's parental rights. (Defendant's Exh. 3).

4. A temporary disposition hearing was held on January 23, 1992, in which the Johnson children were placed in the temporary custody of DHS. (Defendant's Exh. 4).

5. On April 3, 1992, Pierce-Johnson stipulated to the petition in Juvenile Court before Judge Thomas Crewson, and the Johnson

children were adjudicated deprived as to the natural mother. The children were made wards of the court and they continued in DHS custody. (Defendant's Exh. 5).

6. Following a jury trial on May 18-19, 1992, and based upon the jury's findings, the Johnson children were adjudicated deprived as to the natural father and Johnson's parental rights were terminated. (Defendant's Exh. 7).

7. On May 20, 1992, an Amended Information was filed in Tulsa County District Court, charging Johnson with two counts of Injury to Minor Child. (Defendant's Exh. 8).

8. Johnson pleaded guilty on September 9, 1992, to both counts of Injury to Minor Child. He was sentenced to 25 years on each count, with the sentences to run concurrently. (Defendant's Exh. 9, 10).

9. On April 22, 1992, a disposition hearing was held before Judge Crewson, who issued a set of standards for Pierce-Johnson aimed at providing support for her children and correcting the conditions that led to their adjudication as deprived. (Defendant's Exh. 12).

10. On May 3, 1994, a Motion to Terminate Parental Rights was filed, seeking termination of Pierce-Johnson's rights for failure to comply with the standards set at the April 22, 1992, disposition hearing. (Defendant's Exh. 13).

11. From January 1992 to September 1994, Pierce-Johnson applied for and received AFDC benefits, Medicaid and food stamps through DHS. Her AFDC benefits were terminated due to a lack of

eligible children in her home, and her Medicaid benefits were terminated due to her level of earned income. Pierce's authorization for food stamps was for a limited time only, and she did not reapply after the time had expired. (Defendant's Exh. 14).

II. SUMMARY JUDGMENT STANDARD

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Windon Third Oil & Gas v. FDIC, 805 F.2d 342 (10th Cir. 1986). In Celotex, the court stated:

> The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 317 (1986). To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986). The evidence and inferences therefrom must be viewed in a light most favorable to the nonmoving party. Conaway v. Smith, 853 F.2d 789, 792 n. 4 (10th Cir. 1988). Unless the Defendants can demonstrate their entitlement beyond a reasonable doubt, summary judgment must be denied. Norton v.

Liddel, 620 F.2d 1375, 1381 (10th Cir. 1980).

The Tenth Circuit Court of Appeals stated:

> Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." . . . Factual disputes about immaterial matters are irrelevant to a summary judgment determination . . . We view the evidence in a light most favorable to the nonmovant; however, it is not enough that the nonmovant's evidence be "merely colorable" or anything short of "significantly probative."
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> * * *
>
> A movant is not required to provide evidence negating an opponent's claim . . . [r]ather, the burden is on the nonmovant, who "must present affirmative evidence in order to defeat a properly supported motion for summary judgment." . . . After the nonmovant has had a full opportunity to conduct discovery, this burden falls on the nonmovant even though the evidence probably is in possession of the movant. (Citations omitted.)

Committee for the First Amendment v. Campbell, 962 F.2d 1517, 1521 (10th Cir. 1992).

III. LEGAL ANALYSIS

The Court first addresses the allegations in the Complaint made on behalf of Pierce-Johnson. She neither signed the Complaint nor had an attorney sign on her behalf. In fact, there is no indication in the record that she has participated in this case, or even is aware of this case.[2] Fed.R.Civ.P. 11 requires that

> [e]very pleading, written motion and other paper shall be signed by at least one attorney

[2]Pierce-Johnson did not sign the Response to Motion for Summary Judgment, nor any other pleading filed by the plaintiffs in this case.

> of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party.... An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

Notice of the omission was given in DHS's Motion for Summary Judgment, filed September 23, 1994. Johnson's Response to the Motion for Summary Judgment, filed October 13, 1994, does not address this issue, and no attempt has been made to add Pierce-Johnson's signature in the intervening six months. Therefore, the Court hereby strikes the Complaint as to Pierce-Johnson's claims.[3] *See* Lawton v. Medevac Mid-America, Inc., 138 F.R.D. 586 (D.Kan. 1991), (Court dismisses claims of pro se plaintiffs who failed to sign complaint); Snead v. Kirkland, 462 F.Supp. 914 (E.D.Pa. 1978), (Court strikes complaint as to pro se plaintiffs who did not sign); and Wrenn v. New York City Health and Hospitals, 104 F.R.D. 553 (S.D.N.Y. 1985) (Court strikes complaint after plaintiff's counsel takes five weeks to provide omitted signature).

Further, Johnson lacks standing to assert claims on Pierce-Johnson's behalf. The Complaint requests injunctive relief preventing DHS from taking the children from Pierce-Johnson, and prohibiting "further harassment and denial of benefits". The Complaint also requests compensatory damages of $1 million for the

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[3]While 28 U.S.C. § 1654 allows a party to proceed pro se in federal court, it "does not allow for unlicensed laymen to represent anyone else other than themselves." Eagle Associates v. Bank of Montreal, 926 F.2d 1305, 1308 (2nd Cir. 1991). Therefore, Johnson cannot represent Pierce-Johnson in this case.

violation of Pierce-Johnson's rights. In order to have standing to sue, a party "must assert its own legal rights and cannot rest its claim on the interests of others." Housing Authority v. City of Ponca City, 952 F.2d 1183, 1187 (10th Cir. 1991); *see also* Secretary of State v. Joseph H. Munson Co., 467 U.S. 947, 104 S.Ct. 2839, 81 L.Ed.2d 786 (1984). The only request for relief in the Complaint that may affect Johnson is his request for declaratory relief, in which he asks the Court to "declare rights".

Construing Johnson's pro se petition liberally, the Court determines that Johnson is asking for a declaration as to his rights to his children; *i.e.*, a reversal of the state court judgments adjudicating his children deprived and terminating his parental rights. However, the issue of whether his children are deprived has been litigated and determined in a state court proceeding; this Court cannot reopen the judgment to relitigate the merits. Sil-Flo, Inc. v. SFHC, Inc., 917 F.2d 1507 (10th Cir. 1990).

The Court can, however, determine whether Johnson's civil and Constitutional rights were violated in the state court proceedings, as he has alleged. Specifically, Johnson alleges that his civil rights under 42 U.S.C. § 1983 were violated due to a denial of equal protection and due process as required by the U.S. Constitution.

Section 1983 does not create substantive rights; rather, it is a recovery mechanism for the deprivation of a federal right. Watson v. City of Kansas City, Kansas, 857 F.2d 690, 694 (10th Cir. 1988). To establish a cause of action under § 1983, a plaintiff

must allege (1) deprivation of a federal right by (2) a person acting under color of state law. Id. at 694, *citing* Gomez v. Toledo, 446 U.S. 635, 640, 100 S.Ct. 1920, 1923, 65 L.Ed.2d 572 (1980). Therefore, the question before the Court is whether Johnson has provided evidence of a deprivation of his federal rights sufficient to survive a motion for summary judgment.

The purpose of the Equal Protection Clause is to prevent discrimination against individuals based on their membership in a protected class. Therefore, in this case, Johnson must show that he was treated differently by DHS because of his membership in a protected class. Castaneda v. Partida, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977). However, there is no evidence before the Court that Johnson was purposefully discriminated against by DHS. In a § 1983/Equal Protection case, the Tenth Circuit held that, "to survive summary judgment, the plaintiff must go beyond [the] pleadings and show ... evidence of specific facts that demonstrate that it is the policy or custom of the defendants" to discriminate. Watson, 857 F.2d at 694. Johnson has made no such showing. In fact, his Complaint makes no allegation of discriminatory motive or intent, nor does he allege that he is a member of a protected class.

Therefore, the Court now considers Johnson's claim that his due process rights were violated. The relationship of parents to their children is a constitutionally protected right, subject to due process. Matter of Guardianship of S.A.W., 856 P.2d 286 (Okla. 1993); Kickapoo Tribe of Oklahoma v. Rader, 822 F.2d 1493 (10th

Cir. 1987); Santosky v. Kramer, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982). At a minimum, the Due Process Clause requires that "deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." Kickapoo, 822 F.2d at 1497, *citing* Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 313, 70 S.Ct. 652, 656-57, 94 L.Ed. 865 (1950). However, Johnson has made no allegation or showing that he did not receive sufficient notice or opportunity to be heard in the child custody proceedings. In fact, the juvenile court records indicate that Johnson appeared and testified at the child custody trial, and had the opportunity to call witnesses on his behalf. (Defendant's Exh. 7).

In his Response to Motion for Summary Judgment, Johnson clarifies his due process claim to add another basis: he alleges that he was denied an appeal from the child custody case, thereby violating his rights to due process. Johnson alleges that the Juvenile Court judge failed to notify him of his right to appeal the termination of his parental rights; therefore, his right to appeal was waived through no fault of his own. However, the Court notes that a judge in a civil case, such as child custody, has no duty to inform the parties of their right to appeal. Because the Court has found no evidence in the record of a violation of due process or equal protection, Johnson's claim of a § 1983 violation fails.

Johnson further alleges in his Response that summary judgment is inappropriate because a genuine issue of material fact exists as

to the sufficiency of the evidence of abuse in the child custody case. As previously stated, however, this Court cannot relitigate the merits of the child custody case; whether the facts were in dispute as to the child custody issue is irrelevant to this case.

In summary, the claims of Pierce-Johnson are hereby dismissed. Defendants' Motion for Summary Judgment as to Johnson is hereby granted.

IT IS SO ORDERED THIS 31ST DAY OF MARCH, 1995.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ELMER LEON CHAPLIN,

Plaintiff,

vs.

BUILDERS TRANSPORT, INC., and THE INSURANCE COMPANY OF NORTH AMERICA,

Defendants.

CASE NO. 94-C-1197-B

ORDER

This matter comes on for consideration of Defendant, The Insurance Company of North America's (INA) Motion to Dismiss (docket entry # 3).

In its motion INA avers that it is not the liability insurer of Defendant Builders Transport, Inc. (Builders), a haul-for-hire trucking company. Pursuant to 47 O.S. § 169 the liability insurer of a motor carrier such as Builders can be joined in an action for personal injuries against the motor carrier.

In his response, Plaintiff explains that the best information available at the time suit was filed[1] indicated that INA, once Builders liability insurer, remained the same. Plaintiff concedes the matter should be dismissed as to INA and asks the Court to "instruct counsel for the Defendant, Builders Transport, Inc. to

[1] Plaintiff's counsel contacted the Oklahoma State Corporation Commission and was informed that INA first began insuring Builders of December 24, 1985, and there has been no notice of cancellation filed as required.

produce the insurance agreements of all liability insurance policies of Builders Transport, Inc. to counsel for the Plaintiff pursuant to Local Rule 26.2."

The Court concludes INA should be and is herewith dismissed herein as a party defendant. From an exchange of letters attached to Plaintiff's response it appears the material requested by Plaintiff will be provided. If not, Plaintiff may resort to discovery relief.

IT IS SO ORDERED this 21 day of March, 1995.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

Pamela F. Boschee,

Defendant.

CIVIL NO. 95-C-0029-B

AGREED JUDGMENT

This matter comes on for consideration this 21st day of March, 1995, the Plaintiff, United States of America, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and the Defendant, Pamela F. Boschee, appearing pro se.

The Court, being fully advised and having examined the court file, finds that the Defendant, Pamela F. Boschee, acknowledged receipt of Summons and Complaint on February 2, 1995. The Defendant has not filed an Answer but in lieu thereof has agreed that Pamela F. Boschee is indebted to the Plaintiff in the amount alleged in the Complaint and that judgment may accordingly be entered against Pamela F. Boschee in the principal amount of $7,520.83, plus accrued interest in the amount of $191.03 as of December 31, 1994, at the rate of 7.75% per annum until judgment, a surcharge of 10% of the amount of the debt in connection with the recovery of the debt to cover the cost of processing and handling the litigation and enforcement of the claim for this debt as provided by 28 U.S.C. § 3011, plus interest thereafter at the legal rate until paid, plus costs of

this action, plus filing fees allowed pursuant to 28 U.S.C. 2412(a)(2).

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the defendant in the principal amount of $7,520.83, plus accrued interest in the amount of $191.03 as of December 31, 1994, at the rate of 7.75% per annum until judgment, a surcharge of 10% of the amount of the debt in connection with the recovery of the debt to cover the cost of processing and handling the litigation and enforcement of the claim for this debt as provided by 28 U.S.C. § 3011, plus interest thereafter at the legal rate until paid, plus costs of this action, plus filing fees allowed pursuant to 28 U.S.C. 2412(a)(2); plus such other, further or different relief to which Plaintiff might otherwise show itself to be justly entitled.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED;

UNITED STATES OF AMERICA

Stephen C. Lewis
United States Attorney

Loretta F. Radford

LORETTA F. RADFORD
Assistant United States Attorney

Pamela F. Boschee

Pamela F. Boschee

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

MAXINE P. SWARTZ, individually and as personal representative of the ESTATE OF ELBERT DURAN SWARTZ,

Plaintiff,

vs.

CHANDLER, FRATES & REITZ, INC., and KEYPORT SELF-STORAGE MEMPHIS I, an Oklahoma partnership,

Defendants.

Case No. 94-C-1143-BU

ORDER

This matter comes before the Court upon the Agreed Motion to Reinstate and Hold in Abeyance filed on March 17, 1995 by Plaintiff, Maxine Swartz, individually and as personal representative of the Estate of Elbert Duran Swartz. For good cause shown, the Court hereby GRANTS the Motion to Reinstate and VACATES the Dismissal of February 27, 1995. The Court, however, DENIES the Motion to Hold in Abeyance. Instead, the Court DIRECTS the Clerk of the Court to administratively terminate this matter in his records pending resolution of the workers' compensation action in Tennessee.

The parties are DIRECTED to advise the Court within ten (10) days of the final resolution of the workers' compensation proceedings so that the Court may reopen this matter, if necessary, to obtain a final determination of the litigation.

ENTERED this 21 day of March, 1995.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 21 1995

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

TERENCE WOOD,

Plaintiff,

v.

DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES,

Defendant.

93-C-877-W

ENTERED ON DOCKET

DATE MAR 22 1995

JUDGMENT

Judgment is entered in favor of the Secretary of Health and Human Services in accordance with this court's Order filed March 21, 1995.

Dated this 21st day of March, 1995.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

TERENCE WOOD,

Plaintiff,

v.

DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES,

Defendant.

Case No. 93-C-877-W

ORDER

Plaintiff brought this action pursuant to 42 U.S.C. § 405(g) for judicial review of the final decision of the Secretary of Health and Human Services ("Secretary") denying plaintiff's application for disability insurance benefits under §§ 216(i) and 223 and supplemental security income under §§ 1602 and 1614(a)(3)(A) of the Social Security Act, as amended.

The procedural background of this matter was summarized adequately by the parties in their briefs and in the decision of the Administrative Law Judge, which summaries are incorporated herein by reference.

The only issue now before the court is whether there is substantial evidence in the record to support the final decision of the Secretary that plaintiff is not disabled within the meaning of the Social Security Act.[1]

In the case at bar, the ALJ made his decision at the fourth step of the sequential

[1] Judicial review of the Secretary's determination is limited in scope by 42 U.S.C. § 405(g). The court's sole function is to determine whether the record as a whole contains substantial evidence to support the Secretary's decisions. The Secretary's findings stand if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citing Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)). In deciding whether the Secretary's findings are supported by substantial evidence, the court must consider the record as a whole. Hephner v. Mathews, 574 F.2d 359 (6th Cir. 1978).

evaluation process.[2] He found that claimant has the residual functional capacity to perform work-related activities, except for work involving lifting more than 50 pounds occasionally or 25 pounds frequently (TR 14). He concluded that claimant's past relevant work as an auto parts salesman, crew chief, and machinist did not require the performance of work-related activities precluded by the above limitations, so his impairments do not prevent him from performing that past relevant work (TR 14). Having determined that claimant's impairments did not prevent him from performing his past relevant work, the ALJ concluded that he was not disabled under the Social Security Act at any time through the date of the decision.

Claimant now appeals this ruling and asserts alleged errors by the ALJ:

(1) That the ALJ failed to properly assess claimant's complaints of pain.

(2) That the ALJ ignored the treating physician rule.

(3) That the ALJ failed to fully develop the record by considering claimant's mental impairment.

(4) That the ALJ erred in failing to find that claimant's impairments preclude him from performing work on a sustained basis.

It is well settled that the claimant bears the burden of proving his disability that

[2] The Social Security Regulations require that a five-step sequential evaluation be made in considering a claim for benefits under the Social Security Act:

1. Is the claimant currently working?
2. If claimant is not working, does the claimant have a severe impairment?
3. If the claimant has a severe impairment, does it meet or equal an impairment listed in Appendix 1 of the Social Security Regulations? If so, disability is automatically found.
4. Does the impairment prevent the claimant from doing past relevant work?
5. Does claimant's impairment prevent him from doing any other relevant work available in the national economy?

20 C.F.R. § 404.1520 (1983). See generally, Talbot v. Heckler, 814 F.2d 1456 (10th Cir. 1987); Tillery v. Schweiker, 713 F.2d 601 (10th Cir. 1983).

prevents him from engaging in any gainful work activity. Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984).

The medical evidence establishes that the claimant has sciatic nerve injury and chronic pancreatitis. At the hearing, he testified he stays in bed all day and watches television (TR 38). He makes meals of soft food and does no cleaning or housework (TR 39). He has no social activities and only drives occasionally ten miles round trip (TR 38-39). He goes fishing (TR 41-43) and can lift twenty pounds (TR 42). He cannot climb stairs, other than one flight (TR 42). He gets tired easily and nauseated, but has never had surgery (TR 42). His stomach bothers him about once a month or every other month (TR 37). He can stand one hour and walk one hour (TR 38).

The medical record shows that claimant had a history of gastrointestinal problems as far back as 1986 and was treated by Dr. Martin Davis off and on, especially during 1991, for nausea and vomiting (TR 101-107). He was primarily given medications, including Prometh and Nubain (TR 101-107).

Claimant was examined on July 24, 1991 by Dr. R.D. McCullough, II, and was diagnosed as suffering from reflex esophagitis and anxiety (TR 109-110). His physical examination revealed that he weighed 147 pounds at that time (TR 109). He had no cervical or supraclavicular lymphadenopathy and his thyroid gland was not enlarged (TR 109). His abdomen showed epigastric tenderness of a moderate degree and he had no swelling (TR 109-110).

Claimant was given a a gastroenterology examination on December 17, 1991 by Dr. Peter Aran (TR 112-113). Dr. Aran reported that claimant had abdominal pain and only

got partial relief from medication (TR 112). The doctor said: "He may have a recurrent peptic ulcer, or this could be biliary disease, tumor, or pancreatic disease." (TR 113). There was also the possibility of irritable bowel syndrome (TR 113). His abdomen was flat and normal and a rectal exam found no disease or mass (TR 112).

From January 20 through January 22, 1992, claimant was hospitalized for stomach pain and severe vomiting (TR 126-133). His condition was stabilized in two days. He tolerated liquids and a repeat abdominal x-ray showed a normalization of his bowel patterns (TR 126). He was discharged home "on routine activities with a low fat diet" (TR 126). The doctor stated that the claimant had had a problem with his recurrent chronic pancreatitis (TR 126).

A magnetic resonance imaging (MRI) scan was performed June 24, 1992 by Dr. Jay Johnson and confirmed that the claimant had very mild degenerative changes at L5-S1, with a mild bulging disk as well (TR 139). There were no herniated disks or other intraspinal pathology (TR 139). Dr. Johnson examined claimant and reported evidence of sciatica, possibly caused by scar tissue compromising the nerve because of multiple injections into his hips to treat his stomach problem (TR 142). He opined there might be a pressure neuropathy of the sciatic nerve (TR 142). Dr. Johnson reevaluated claimant on July 9, 1992 and found that he had scarring of the right piriformis muscle and recommended neurolysis of the region in order to free the nerve (TR 136).

On August 17, 1992, Dr. Davis, claimant's treating doctor, reported that he could sit for 2 hours at a time, stand for 1 hour at a time, walk for 2 hours at a time, and could work an 8-hour day if he sat for 3 hours, stood for 2 hours, and walked for 3 hours (TR

144). He could occasionally lift 20 pounds and frequently lift 5 pounds. He could carry 5 pounds frequently (TR 144). He was able to use his feet for repetitive movements, crawl occasionally, and reach frequently (TR 145). The only restrictions the doctor found were restrictions from unprotected heights, moving machinery, and marked changes in temperature, and moderate restrictions on exposure to dust and fumes (TR 145). The doctor concluded claimant was "temporarily totally disabled" until the nerves of his leg could regenerate (TR 146) (emphasis added).

On August 3, 1992, Dr. Jeff Williams, a neurological surgeon, confirmed that the claimant had suffered a sciatic nerve injury with no evidence of a lumbar radiculopathy, piriformis, or sciatic nerve compression (TR 152). He concluded claimant had a direct traumatic lesion to the sciatic nerve (TR 152). There was no indication that surgery was required, and the claimant was told that the condition would improve with time (TR 152).

The ALJ concluded that these records did not support claimant's allegations of disabling pain and a need to be totally housebound (TR 13). The ALJ noted claimant only suffers pancreatitis once every two months and he was only hospitalized once for two days with the problem (TR 13). The ALJ found that his condition is controlled by medication (TR 13).

The ALJ also determined that claimant's sciatic nerve injury was new, having occurred in March 1992, and the doctor had said it was a temporary condition that would improve (TR 13). The ALJ noted that the claimant "cannot attempt to piggyback disabling conditions. He alleged that he was disabled as of December 1990, and as of March 1992, the claimant was not disabled by his epigastric problems, nor is his problem with his sciatic

nerve expected to last for 12 months, and even if it did, the claimant would still be capable of performing substantial gainful activity" (TR 13). The ALJ noted that claimant had lost weight, but his condition should stabilize now that he was receiving the correct treatment (TR 13). The ALJ found that medication does not cause bad side effects, there are no problems with sleep patterns, there are no mental problems, claimant has not consumed alcohol other than an occasional beer for more than two years, and there are no exacerbating conditions (TR 13).

The ALJ concluded that an evaluation of claimant's symptoms, the nature, duration, frequency, and intensity of the pain, the dosage, effectiveness, and side effects of the medication taken, and the claimant's functional restrictions and daily activities show that claimant is not suffering disabling pain (TR 13). The ALJ determined that claimant's residual functional capacity was medium, because he can lift 50 pounds occasionally or 25 pounds frequently, he has no problem with radiculopathy to his back, he has no problem bending, and he has full range of motion of all joints and should suffer no pain on lifting up to 50 pounds (TR 13). The ALJ noted that since claimant is expected to recover within 12 months from his sciatic nerve injury, there is no limitation on walking, sitting, or standing (TR 13).

There is no merit to claimant's contention that the ALJ failed to properly assess his complaints of pain. Pain, even if not disabling, is a nonexertional impairment to be taken into consideration, unless there is substantial evidence for the ALJ to find that the claimant's pain is insignificant. Thompson v. Sullivan, 987 F.2d 1482 (10th Cir. 1993). Both physical and mental impairments can support a disability claim based on pain. Turner

v. Heckler, 754 F.2d 326, 330 (10th Cir. 1985). The Tenth Circuit has said that "subjective complaints of pain must be accompanied by medical evidence and may be disregarded if unsupported by any clinical findings." Frey v. Bowen, 816 F.2d 508, 515 (10th Cir. 1987). The court in Luna v. Bowen, 834 F.2d at 165-66, discussed what a claimant must show to prove a claim of disabling pain:

> [W]e have recognized numerous factors in addition to medical test results that agency decision makers should consider when determining the credibility of subjective claims of pain greater than that usually associated with a particular impairment. For example, we have noted a claimant's persistent attempts to find relief for his pain and his willingness to try any treatment prescribed, regular use of crutches or a cane, regular contact with a doctor, and the possibility that psychological disorders combine with physical problems. The Secretary has also noted several factors for consideration including the claimant's daily activities, and the dosage, effectiveness, and side effects of medication. Of course no such list can be exhaustive. The point is, however, that expanding the decision maker's inquiry beyond objective medical evidence does not result in a pure credibility determination. The decision maker has a good deal more than the appearance of the claimant to use in determining whether the claimant's pain is so severe as to be disabling. (Citations omitted).

See also, Hargis v. Sullivan, 945 F.2d 1482, 1489 (10th Cir. 1991).

Pain must interfere with the ability to work. Ray v. Bowen, 865 F.2d 222, 225 (10th Cir. 1989). A claimant is not required to produce medical evidence proving the pain is inevitable. Frey, 816 F.2d at 515. He must establish only a loose nexus between the impairment and the pain alleged. Luna, 834 F.2d at 164. "'[I]f an impairment is reasonably expected to produce some pain, allegations of disabling pain emanating from that impairment are sufficiently consistent to require consideration of all relevant evidence.'" Huston v. Bowen, 838 F.2d 1125, 1129 (10th Cir. 1988) (quoting Luna, 834 F.2d at 164).

Because there was some objective medical evidence to show that plaintiff had a sciatic nerve injury and stomach problems producing pain, the ALJ was required to consider the assertions of severe pain and to "decide whether he believe[d them]." Luna, 834 F.2d at 163; 42 U.S.C. § 423(d)(5)(A). However, "the absence of an objective medical basis for the degree of severity of pain may affect the weight to be given to the claimant's subjective allegations of pain, but a lack of objective corroboration of the pain's severity cannot justify disregarding those allegations." Luna, 834 F.2d at 165. This court need not give absolute deference to the ALJ's conclusion on this matter. Frey, 816 at 517.

The ALJ considered the factors in Luna, particularly the claimant's admission that he only suffers pancreatitis once every two months and his treating doctor's report that his back pain was temporary, in concluding that his pain was not totally disabling. There are no medical diagnoses of claimant's alleged "anxiety-depressive reaction" by a trained psychologist or psychiatrist, but merely mention of this and "anxiety" by two medical doctors (TR 96, 110). He cannot support a claim that he has a mental "impairment" with the evidence in the record. While he contends the Phenergan made him tired and Nubain injections caused "nerve damage," these do not prove disabling pain.

There is no merit to claimant's contention that the ALJ did not give substantial weight to claimant's treating physician's diagnosis, as required by Turner v. Heckler, 754 F.2d at 329. The ALJ noted Dr. Davis' opinion and followed it (TR 12). The doctor only found that claimant was temporarily totally disabled until his right leg was healed (TR 146). The doctor stated that claimant could work an eight-hour day and could alternate standing and sitting, and thus be on his feet at least five hours in an 8-hour day (TR 144).

Claimant's past jobs did not require standing more than that or carrying 20 pounds frequently. No physician found claimant permanently disabled or permanently unable to return to his past work.

There is also no merit to claimant's argument that the ALJ failed to fully develop the record by considering his "anxiety and depressive disorder." As already discussed, claimant's anxiety was only mentioned by two medical doctors (TR 96, 110), and he was never seen by a psychologist or mental health expert for any sort of mental problems. The ALJ was not required to call a vocational expert unless the record did not contain information on the plaintiff's ability to perform work activities other than those connected with his former work. Decker v. Harris, 647 F.2d 291, 298 (2nd Cir. 1981).

Finally, there is no merit to claimant's argument that his impairments preclude him from performing work on a sustained basis. Claimant has not had to "constantly" have Nubain injections, as he has only had the nerve injury since August of 1992 and Dr. Davis reported it was a temporary disability (TR 146). Claimant's "periodic uncontrollable vomiting" only occurs once a month or every other month (TR 37) and no doctor has stated he has to have "bed rest." Except for his own self-serving testimony, there is no evidence he could not work on a sustained basis once his leg nerves healed. It has been recognized that "some claimants exaggerate symptoms for purposes of obtaining government benefits, and deference to the fact-finder's assessment of credibility is the general rule." Frey v. Bowen, 816 F.2d at 517.

The decision of the ALJ is supported by substantial evidence and is a pertinent application of the Social Security regulations. The decision is affirmed.

Dated this 21st day of March, 1995.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S:Wood

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THERESA BAKER,)
PLAINTIFF,)
VS.) CASE NO. 95-C-~~1029~~-B
72
AMERICAN AIRLINES)
DEFENDANT.)

STIPULATION OF DISMISSAL WITHOUT PREJUDICE

Plaintiff, Theresa Baker, by and through her counsel of record, Richardson & Stoops, by Charles L. Richardson, and in accordance with the provisions of Fed. R. Civ. Proc. 41(a)(1) hereby enters into an agreed stipulation with counsel for Defendant for the dismissal without prejudice of the above-entitled action.

Both parties agree to bear their own costs and attorneys fees.

Charles L. Richardson
Richardson & Stoops
6846 South Canton, Suite 200
Tulsa, Oklahoma 74136-3414
(918) 492-7674
Attorney for Plaintiff

David R. Cordell
Conner & Winters
Suite 2400, 15 East 5th Street
Tulsa, Oklahoma 74103
(918) 586-8995
Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 21 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

MARVIN WASHINGTON,

Plaintiff,

vs.

RON CHAMPION,

Defendant.

No. 94-C-731-BU

ENTERED ON DOCKET

DATE 3/22/95

ORDER

At issue before the Court is Defendant's motion to dismiss and/or for summary judgment. Plaintiff, a pro se litigant, has failed to respond although the Court has twice granted him extensions of time to file a response to Defendant's motion to dismiss.

Plaintiff's failure to respond to Defendant's motion constitutes a waiver of objection to the motion, and a confession of the matters raised by the motion. See Local Rule 7.1.C.[1] In any event, the Court concludes that Plaintiff's eighth amendment claim for exposure to toxic fumes from fresh paint while the guards were painting the Restrictive Housing Unit (RHU) does not state a claim upon which relief can be granted.[2]

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[1]Local Rule 7.1.C reads as follows:

> Response Briefs. Response briefs shall be filed within fifteen (15) days after the filing of the motion. Failure to timely respond will authorize the court, in its discretion, to deem the matter confessed, and enter the relief requested.

[2]The Court has previously granted Plaintiff's motion to dismiss Defendant Owens. (Doc. #8.)

//

I. ANALYSIS

A court should dismiss a constitutional civil rights claim only if it appears beyond doubt that plaintiff could prove no set of facts in support of his claim which would entitle him to relief. Meade v. Grubbs, 841 F.2d 1512, 1512 (10th Cir. 1988) (citing Owens v. Rush, 654 F.2d 1370, 1378-79 (10th Cir. 1981)). For purposes of reviewing a complaint for failure to state a claim, all allegations in the complaint are presumed true and construed in a light most favorable to the plaintiff. Id.; Hall v. Bellmon, 935 F.2d 1106, 1109 (10th Cir. 1991). Furthermore, pro se complaints are held to less stringent standards than pleadings drafted by lawyers and the court must construe them liberally. Haines v. Kerner, 404 U.S. 519, 520 (1972).

In order to make out a successful claim alleging a deprivation of the Cruel and Unusual Punishment Clause Plaintiff must meet an objective component (was the deprivation sufficiently serious?) and a subjective component (did the officials act with a sufficiently culpable state of mind?). Wilson v. Seiter, 501 U.S. 294, 298 (1991). The objective component has its roots in contemporary standards of decency. Hudson v. McMillian, 503 U.S. 1, 112 S.Ct. 995, 1000 (1992). Deprivations must be objectively serious along a spectrum measured by contemporary notions of decency. Rhodes v. Chapman, 452 U.S. 337 (1981). In Hudson, the Supreme Court explained that "extreme deprivations are required to make out a conditions-of-confinement claim." Hudson, 112 S.Ct. at 1000. "Because routine discomfort is part of the penalty that criminal

offenders pay for their offenses against society, only those deprivations denying the minimal civilized measure of life's necessities are sufficiently grave to form the basis of an Eighth Amendment violation." Id. (quoted cases omitted). Thus, to meet the objective component, Plaintiff must prove conduct by Defendant Champion which is adverse to social standards of decency. Id., 112 S. Ct. at 1000.

The subjective component, on the other hand, focuses on whether the prison officials acted with the requisite culpable state of mind to be considered as acting with a deliberate indifference to a prisoner's living conditions. Deliberate indifference is shown if the prison official "knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measure to abate it." Farmer v. Brennan, 114 S.Ct. 1970, 1984 (1994).

After liberally construing the complaint in this action, and taking as true Plaintiff's allegations, the Court finds that a five-day exposure to fumes from fresh paint while the RHU was being painted does not amount to a sufficiently serious deprivation to be considered cruel and unusual punishment. Plaintiff alleges that he was exposed to fumes from fresh paint while in his cell in the RHU during the week of June 17-22, 1994, and that "the paint fumes were causing me to regrudeatate [sic], headaces [sic], and dizzness [sic], which resulted in cruel and unusual punishment. . ." (Doc. #1 at 2.) Plaintiff does not allege, however, facts sufficient to establish that he was exposed to unreasonably high levels of toxic

fumes that posed an unreasonable risk of serious damage to his future health. Cf. Helling v. McKinney, 113 S.Ct. 2475, 2480 (1993) (facts alleged were sufficient to establish that prisoner was exposed to levels of environmental tobacco smoke that posed unreasonable risk of serious damage to his future health). While it is unfortunate that Plaintiff was dizzy and suffered nausea from June 17-22, 1994, and possibly during the next couple of days, exposure to paint fumes over a short period of time is a common fact of contemporary life, which cannot be considered a serious deprivation amounting to punishment.

It is instructive to note that the Seventh Circuit Court of Appeals has similarly held that a prisoner's exposure to asbestos-covered pipes near a prisoner's cell for a ten-month period was not sufficiently serious to violate the constitution. McNeil v. Lane, 16 F.3d 123, 124-25 (7th Cir. 1993). The McNeil court observed: "[I]t is unfortunate, but the fact remains that asbestos abounds in many public buildings. Exposure to moderate levels of asbestos is a common fact of contemporary life and cannot, under contemporary standards, be considered cruel and unusual." Id. at 125.

Accordingly, the Court concludes that because Plaintiff's claim based on paint fumes does not present a serious deprivation amounting to punishment Defendant's motions to dismiss should be granted. If, however, Plaintiff can allege facts sufficient to allege that the exposure posed an unreasonable risk of serious damage to his health, Plaintiff may amend his individual complaint to do so. See Hall v. Bellmon, 935 F.2d 1106, 1109-10 (10th Cir.

1991) (noting that a pro se plaintiff should be given notice and opportunity to amend the complaint before dismissal under Fed. R. Civ. P. 12(b)(6)).

II. CONCLUSION

After liberally construing Plaintiff's complaint, the Court concludes that Defendant's motions to dismiss for failure to state a claim should be granted. Plaintiff may file a motion for leave to amend and a proposed amended complaint within twenty (20) days from the date of entry of this order to cure the defects noted in this order. Specifically Plaintiff must allege facts indicating what harm he suffered as a result of the exposure to paint fumes. In order to survive a motion to dismiss, Plaintiff's amended complaint must show that the conditions of which he complains amounted to a serious health risk.

ACCORDINGLY, IT IS HEREBY ORDERED that:

(1) Defendant's motions to dismiss for failure to state a claim (doc. #5-1) is granted and the alternative motion for summary judgment (doc. #5-2) is denied.

(2) Plaintiff may file a motion for leave to amend and a proposed amended complaint as outlined in this order on or before twenty (20) days from the date of filing of this order. **Failure to do so will result in the**

dismissal of this action.

SO ORDERED THIS 21 **day of** March, 1995.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
STEPHEN M. HAUSE;	)	
JANICE J. HAUSE;	)	
CARL I. BROWN and COMPANY;	)	
SECURITY PACIFIC MORTGAGE CORP.,	)	
COUNTY TREASURER, Rogers County, Oklahoma;	)	
BOARD OF COUNTY COMMISSIONERS, Rogers County, Oklahoma,	)	
	)	
Defendants.	)	**CIVIL ACTION NO. 94-C-695-K**

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 20 day of March, 1995. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Rogers County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Rogers County, Oklahoma, appear by Michele L. Schultz, Assistant District Attorney, Rogers County, Oklahoma; the Defendant, CARL I. BROWN & COMPANY, appears not having previously filed a Disclaimer; and the Defendants, STEPHEN M. HAUSE, JANICE J. HAUSE and SECURITY PACIFIC MORTGAGE, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, STEPHEN M. HAUSE, signed a Waiver of Summons on August 10, 1994; that the Defendant, JANICE J. HAUSE, signed a Waiver of Summons on August 11, 1994; that

NOTE: THIS ORDER IS TO BE MAILED BY MOVANT TO ALL COUNSEL AND PRO SE LITIGANTS IMMEDIATELY UPON RECEIPT.

the Defendant, CARL I. BROWN & COMPANY, signed a Waiver of Summons on July 19, 1994; that Defendant, COUNTY TREASURER, Rogers County, Oklahoma, acknowledged receipt of Summons and Complaint on July 18, 1994, by Certified Mail; and that Defendant, BOARD OF COUNTY COMMISSIONERS, Rogers County, Oklahoma, acknowledged receipt of Summons and Complaint on July 18, 1994, by Certified Mail.

The Court further finds that the Defendant, SECURITY PACIFIC MORTGAGE CORPORATION, was served by publishing notice of this action in the Claremore Daily Progress, a newspaper of general circulation in Rogers County, Oklahoma, once a week for six (6) consecutive weeks beginning December 27, 1994, and continuing through January 31, 1995, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendant, SECURITY PACIFIC MORTGAGE CORPORATION, and service cannot be made upon said Defendant within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendant without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known address of the Defendant, SECURITY PACIFIC MORTGAGE CORPORATION. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Department of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern

District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the party served by publication with respect to its present or last known place of residence and/or mailing address. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendant served by publication.

It appears that the Defendants, COUNTY TREASURER, Rogers County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Rogers County, Oklahoma, filed their Answer on July 22, 1994; that the Defendant, CARL I. BROWN & COMPANY, filed its Disclaimer on August 5, 1994; and that the Defendants, STEPHEN M. HAUSE, JANICE J. HAUSE, and SECURITY PACIFIC MORTGAGE CORPORATION, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Rogers County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot 3, Block 2 of NORFLEET ADDITION, a Subdivision of Section 16, Township 21 North, Range 16 East of the IB&M, Rogers County, Oklahoma, according to the recorded Plat thereof.

The Court further finds that on October 7, 1983, the Defendants, STEPHEN M. HAUSE and JANICE J. HAUSE, executed and delivered to Carl I. Brown and Company their mortgage note in the amount of $41,700.00, payable in monthly

installments, with interest thereon at the rate of Thirteen and One-Fourth percent (13.25%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, STEPHEN M. HAUSE and JANICE J. HAUSE, husband and wife, executed and delivered to Carl I. Brown and Company, a mortgage dated October 7, 1983, covering the above-described property. Said mortgage was recorded on October 12, 1983, in Book 659, Page 457, in the records of Rogers County, Oklahoma. the Mortgage was refiled on March 6, 1984, in Book 670, Page 266, in the records of Rogers County, Oklahoma.

The Court further finds that on October 12, 1983, Carl I. Brown and Company, assigned the above-described mortgage note and mortgage to Security Pacific Mortgage Corporation. This Assignment of Mortgage was recorded on November 28, 1983, in Book 662, Page 648, in the records of Rogers County, Oklahoma. This Assignment was re-recorded on March 6, 1984, in Book 670, Page 269, in the records of Rogers County, Oklahoma.

The Court further finds that on October 11, 1985, Security Pacific Mortgage Corporation, assigned the above-described mortgage note and mortgage to Manufacturers Hanover Mortgage Corporation, its successors and assigns. This Assignment of Mortgage was recorded on December 27, 1989, in Book 720, Page 809, in the records of Rogers County, Oklahoma.

The Court further finds that on May 27, 1988, Fireman's Fund Mortgage Corporation fka Manufacturers Hanover Mortgage, assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington,

D.C., his successors and assigns. The Assignment of Mortgage was recorded on June 22, 1988, in Book 786, Page 900, in the records of Rogers County, Oklahoma.

The Court further finds that on July 1, 1988, the Defendants, STEPHEN M. HAUSE and JANICE J. HAUSE, husband and wife, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on March 1, 1990.

The Court further finds that the Defendants, STEPHEN M. HAUSE and JANICE J. HAUSE, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, STEPHEN M. HAUSE and JANICE J. HAUSE, are indebted to the Plaintiff in the principal sum of $80,765.45, plus interest at the rate of 13.25 percent per annum from June 16, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendants, STEPHEN M. HAUSE, JANICE J. HAUSE and SECURITY PACIFIC MORTGAGE CORPORATION, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendants, COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS, Rogers County, Oklahoma, claim no right, title or interest in the subject real property.

The Court further finds that the Defendant, CARL I. BROWN & COMPANY, Disclaims any right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment against the Defendants, STEPHEN M. HAUSE and JANICE J. HAUSE, in the principal sum of $80,765.45, plus interest at the rate of 13.25 percent per annum from June 16, 1994 until judgment, plus interest thereafter at the current legal rate of 6.57 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS, Rogers County, Oklahoma, STEPHEN M. HAUSE, JANICE J. HAUSE, CARL I. BROWN & COMPANY and SECURITY PACIFIC MORTGAGE CORPORATION, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, STEPHEN M. HAUSE and JANICE J. HAUSE, to satisfy the judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney

for LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

MICHELE L. SCHULTZ, OBA #13771
Assistant District Attorney
219 S. Missouri, Room 1-111
Claremore, Oklahoma 74017
(918) 341-3164
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Rogers County, Oklahoma

Judgment of Foreclosure
Civil Action No. 95-C-695-K

LFR:flv

44-131

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

TANYA ROVANG,

Plaintiff,

vs.

WAL-MART STORES, INC.,

Defendant.

No. 94-C-785 K

STIPULATION OF DISMISSAL

COME NOW the parties and pursuant to Fed.R.Civ.P. 41(a) and hereby stipulate to the dismissal of the above-styled cause.

JAY MORGAN
Attorney for Plaintiff

MARK T. STEELE
Attorney for Defendant

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HOWARD DOBSON, JR.; KATHY A. DOBSON; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

Civil Case No. 95 C 228B

ORDER

Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good cause shown it is hereby **ORDERED** that this action shall be dismissed without prejudice.

Dated this 17th day of March, 1995.

s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

for Thomas R. Brett, Chief Judge

NOTE: THIS ORDER IS TO BE MAILED

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

for **LORETTA F. RADFORD, OBA #11158**
Assistant United States Attorney
3600 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

LFR:flv

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FEIZY IMPORT AND EXPORT COMPANY, a Texas corporation,

Plaintiff,

vs.

HAMID NAZARI and TERRI NAZARI, Husband and Wife, d/b/a GENIE UPHOLSTERY AND DECORATING; and ORIENTAL RUG WAREHOUSE, INC., a Kentucky Corporation,

Defendants.

No. 95-C-188B

AGREED JOURNAL ENTRY OF JUDGMENT

Now, on this 17th day of March, 1995, this cause comes on for hearing, the Plaintiff appearing by its attorneys, Shdeed & Hartmann, the Defendants, Hamid Nazari and Terri Nazari, Husband and Wife, dba Genie Upholstery and Decorating, appearing in person; and it appearing to the Court that this is a suit upon an open sales account, consignment account, a personal guaranty and foreclosure of a UCC-1 filing.

The Court thereupon examined the pleadings, process and files and having heard the testimony and evidence of the Plaintiff and said Defendants and upon being advised that said parties have reached an agreement with respect to judgment being rendered in this action and the Court finds that all of the material allegations in Plaintiff's Petition are true. The Court further finds that diversity exists and the amount in controversy exceeds $50,000.00, thus, jurisdiction of the parties and subject matter of this action is proper. The Court further finds that due and regular service of summons has been made upon the

Defendants, Hamid Nazari and Terri Nazari, by personal service on the 7th day of March, 1995, and that said summons and service thereof is legal and regular in all respects. The Court further finds that the Defendants, Hamid Nazari and Terri Nazari, dba Genie Upholstery and Decorating, and each of them owe the Plaintiff the total sum of $164,562.14 on an open sales account and consignment account, and that said amount is personally guaranteed by the Defendant, Terri Nazari, and is secured by a properly perfected UCC-1 filing, which covers among other things, all accounts, contract rights and inventory of said Defendants.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED By the Court that the Plaintiff, Feizy Import and Export Company, have judgment against the Defendants, Hamid Nazari and Terri Nazari, dba Genie Upholstery and Decorating, and each of them, for the total sum of $164,562.14 with interest thereon at the rate of 6.57% until paid; a reasonable attorneys fee in the sum of $5,000.00, and for all costs of this action.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED By the Court that the Plaintiff's UCC-1 filing constitutes a good and valid lien upon all accounts, contract rights and inventory of said Defendants and that the same shall be foreclosed with the inventory of said Defendants being sold and the proceeds from said sale being applied to the judgment hereinabove rendered until the same is paid in full.

FOR ALL OF WHICH LET EXECUTION ISSUE.

s/ TERRY C. KERN

DISTRICT JUDGE
for Thomas R. Brett, Chief Judge

APPROVED:

Hamid Nazari, Defendant

Terri Nazari, Defendant

James M. Elias
SHIDEED & HARTMANN
4308 Classen Boulevard
Oklahoma City, OK 73118
Telephone: (405) 528-2422
Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

DEANNA K. McSWAIN,

Plaintiff,

v.

DONNA E. SHALALA,
SECRETARY OF HEALTH AND
HUMAN SERVICES,

Defendant.

Case No. 93-C-743-W

ORDER

Plaintiff brought this action pursuant to 42 U.S.C. § 405(g) for judicial review of the final decision of the Secretary of Health and Human Services ("Secretary") denying plaintiff's application for disability insurance benefits under §§ 216(i) and 223 and supplemental security income under §§ 1602 and 1614(a)(3)(A) of the Social Security Act, as amended.

The procedural background of this matter was summarized adequately by the parties in their briefs and in the decision of the Administrative Law Judge, which summaries are incorporated herein by reference.

The only issue now before the court is whether there is substantial evidence in the record to support the final decision of the Secretary that plaintiff is not disabled within the meaning of the Social Security Act.[1]

In the case at bar, the ALJ made his decision at the fourth step of the sequential

[1] Judicial review of the Secretary's determination is limited in scope by 42 U.S.C. § 405(g). The court's sole function is to determine whether the record as a whole contains substantial evidence to support the Secretary's decisions. The Secretary's findings stand if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citing Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)). In deciding whether the Secretary's findings are supported by substantial evidence, the court must consider the record as a whole. Hephner v. Mathews, 574 F.2d 359 (6th Cir. 1978).

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evaluation process.[2] He found that claimant had the residual functional capacity to perform work-related activities, except for work involving lifting more than 50 pounds occasionally or 25 pounds frequently. He concluded that claimant has a junior college education and a good ability to follow work rules, relate to co-workers, deal with the public, function independently, understand, remember, and carry simple job instructions, and to demonstrate reliability. He concluded that claimant has a very good ability to maintain personal appearance, and she has a fair ability to behave in an emotionally stable manner, relate predictably in social situations, understand, remember, and carry out detailed, but not complex job instructions, interact with supervisors and deal with work stresses, and use judgment with the public. He concluded that claimant has poor to no ability to maintain attention and concentration and to understand, remember, and carry out complex instructions.

The ALJ found that claimant's past relevant work as an appointment clerk did not require the performance of work-related activities precluded by the above limitations, so her impairment did not prevent her from performing her past relevant work. Having determined that claimant's impairment did not prevent her from performing her past relevant work, the ALJ concluded that she was not disabled under the Social Security Act

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[2] The Social Security Regulations require that a five-step sequential evaluation be made in considering a claim for benefits under the Social Security Act:

1. Is the claimant currently working?
2. If claimant is not working, does the claimant have a severe impairment?
3. If the claimant has a severe impairment, does it meet or equal an impairment listed in Appendix 1 of the Social Security Regulations? If so, disability is automatically found.
4. Does the impairment prevent the claimant from doing past relevant work?
5. Does claimant's impairment prevent him from doing any other relevant work available in the national economy?

20 C.F.R. § 404.1520 (1983). See generally, Talbot v. Heckler, 814 F.2d 1456 (10th Cir. 1987); Tillery v. Schweiker, 713 F.2d 601 (10th Cir. 1983).

at any time through the date of the decision.

Claimant now appeals this ruling and asserts alleged errors by the ALJ:

(1) That the ALJ ignored the treating physician rule by failing to agree with the assessments of Drs. Wellshear and Fotiu.

(2) That the ALJ's hypothetical question to the vocational expert was inadequate because it did not include a "poor to none" concentration ability.

It is well settled that the claimant bears the burden of proving her disability that prevents her from engaging in any gainful work activity. Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984).

The medical evidence establishes that the claimant has severe schizophreniform disorder, personality disorder, status post major generalized depression, and status post hyperthyroidism. She has not engaged in substantial gainful activity since December 4, 1991. The ALJ concluded that her subjective allegations of totally disabling mental impairments were not credible to the extent alleged, although they existed to a moderate extent.

Claimant testified that she cares for herself, does household chores, watches television, reads, does crossword puzzles, and takes a walk in the park most afternoons (TR 125-126). She drives a couple miles most days, goes to a yoga class once a week, and goes to sorority alumni group meetings and lithium recovery group meetings (TR 126-127).

She claims that she started having anxiety attacks on December 4, 1991 when she thought it was the "end of the world" and "the authorities" were after her (TR 121). She was hospitalized for three weeks and was treated by Dr. Wilshire [sic] (TR 121). She was afraid to take the medications he prescribed (TR 122). She continues to see Dr. Wilshire

[sic] every three to four weeks (TR 122) and has improved since 1991 and no longer feels "everyone is watching . . . or chasing" her (TR 123).

Claimant testified that she gets an anxiety attack now several times a month for an hour or so (TR 123). She acts compulsively at times, such as washing her face 30 to 40 times in a row (TR 124). She contends she has trouble concentrating at times, especially when tired or stressed (TR 128, 131, 133) and when she tries to concentrate her head jerks and eyes blink (TR 130-131). Her medications sometimes make it hard for her to talk (TR 131-132). When she feels depressed, she cries a lot (TR 132). She has memory problems sometimes when she goes to buy groceries or tries to follow a recipe (TR 134). At times, she feels she would like to return to work (TR 135).

Plaintiff was hospitalized November 30 through December 2, 1991 and treated for paranoia, anxiety, and depression (TR 253-254). A second hospitalization a few days later involved a major depression with possible psychotic symptoms (TR 111, 262-264). Dr. Harold MacNamara completed a Minnesota Multiphasic Personality Inventory on December 11, 1991 (TR 255-257) and concluded she was suffering from depression:

> Clinically she is most likely to respond depressively. The depression is likely to be regressive, characterized by helplessness. Suicidal inclinations can be inferred.
>
> She is an individual who may at times retain ego integrity through a pseudoneurotic somatization process. However, she must be understood as being vulnerable to a rapid disorganization in the face of realities that impact her poor identity formation.
>
> Often cognition is borderline unusual. There are intrusive thoughts and there is often a loss of control of cognition to a degree that she believes or experiences that something is wrong with her mind. However, there is no specific evidence of an ongoing psychotic process. What the testing reflects then is not a literal decompensation but an indication of the degree to which

> she is cut off from the reality of life involvements and investments. She has not developed a sense of self and her experience is often "as if" reality eludes her or escapes her in some way.

(TR 257). The medical expert, Dr. Thomas Goodman, testified at the hearing and noted that this showed a severe personality disorder, but no psychotic illness (TR 111). The expert also concluded that the record of claimant's hospitalization in 1991 was very vague and no diagnosis was made (TR 110).

During her hospitalization, the severity of the psychosocial stressors were appraised as "moderate" and she was treated with medication (TR 264). She was diagnosed with "schizophreniform illness" (TR 265). The medical expert testified at the hearing that this was a short-term disorder that "would have resolved within a few weeks period of time or few months after she was hospitalized." (TR 140). The expert noted that, when examined by Dr. Charles Wellshear on February 21, 1992 and on September 3, 1992, she would not have fit this diagnosis (TR 140) and Wellshear must have been rating her "when she was at her worse [sic]" and missing other evidence (TR 140). In addition, the claimant was described as being obsessive-compulsive and paranoid, but the expert could find no evidence of social inner personal problems or difficulties of social functioning (TR 141). He said that while the test in December 1991 indicated that she was vulnerable to certain problems, it did not indicate that, in fact, she suffered from them (TR 140-141).

The mental status form prepared by Dr. Wellshear on February 21, 1992 indicated that claimant related satisfactorily to the staff in his office, but had significant anxiety and agitation with confusion and a worrisome and apparent set of delusional notions regarding a former supervisor (TR 268). She had great concern about her physical health at times,

evidence of insecurity, many obsessive thoughts, and worry about her health and body conditions (TR 268). The doctor recommended supportive psychotherapy and medicine, and his diagnosis was "schizophreniform disorder with obsessive compulsive features and dysthymia" (TR 268).

On September 4, 1992, Dr. Wellshear reported that he saw the claimant on a regular basis, that her clinical picture was of gradual recovery from schizophreniform decompensation, and that she had had some side effects, including jerking movements, but they had diminished, and the prognosis for eventual recovery and return to the work force was more positive than some months earlier (TR 270-272). The medical expert testified that claimant's treatment by Dr. Wellshear with Lithium and Triavil was unusual and not sound practice following personality tests showing her generalized anxiety, a somatization disorder, and personality disturbance (TR 110).

Dr. Peter Fotiu stated in a letter dated February 5, 1993 that Listings 12.03 (Schizophrenic, Paranoid and other Psychotic Disorders), 12.04 (Affective Disorders), 12.06 (Anxiety Related Disorders) and 12.08 (Personality Disorders) all applied to claimant, but that only the requirements of Listing 12.03 were fully met (TR 292-295). He stated that she had delusions or hallucinations, incoherence, emotional withdrawal and isolation, moderate restriction of activities of daily living, a marked difficulty maintaining social functioning, frequent deficiencies of concentration, persistence, and pace, and repeated episodes of deterioration or decompensation in work-like settings (TR 293-294). In regard to his conclusion that the claimant had met Listing 12.03, Dr. Fotiu also stated:

> Medically documented history of one or more episodes of acute symptoms, signs and functional limitations which at the time met the

> requirements in A and B of 12.03, although these symptoms or signs are currently attenuated by medication or psychosocial support (TR 294). (emphasis supplied)

The medical expert noted that Dr. Fotiu (TR 292-295) indicated that claimant met the requirements of these listings, but Dr. Fotiu did not list the period of time in which the claimant met the Listings nor indicate why the claimant met those Listings (TR 113-114). The expert, Dr. Goodman, reported that claimant did not meet or equal any Listing in the Listing of Impairments, but she had characteristics of Listings 12.03, 12.04, and 12.08 (TR 115-117). She suffered from a significant personality disorder and a schizophreniform diagnosis, but there was no evidence that she suffered from a somatic disorder (TR 115-116).

The medical expert, Dr. Goodman, concluded that the claimant had a good ability to follow work rules, relate to co-workers, deal with the public, function independently, understand, remember, and carry out simple job instructions, and demonstrate reliability. She had a fair ability to interact with supervisors, deal with work stresses, use judgment with the public, behave in an emotionally stable manner, relate predictably in social situations, and understand, remember, and carry out detailed, but not complex job instructions (TR 143, 312-314). She had poor to no ability to understand, remember, and carry out complex instructions and to maintain attention and concentration and unlimited to very good ability to maintain her personal appearance (TR 143, 312-314). Under the "B" criteria for schizophrenic behavior, Dr. Goodman reported the claimant suffered delusions which were brief and now resolved (TR 140-141).

Dr. Goodman reported that the claimant had slight to moderate restriction of daily

activities, and moderate difficulties maintaining social functioning. She had frequent deficiencies of concentration, persistence, or pace resulting in a failure to complete tasks in a timely manner in work settings or elsewhere, and, once or twice, she had episodes of deterioration or decompensation in work or work-like settings which caused her to withdraw from that situation (TR 310).

The ALJ noted that claimant "performed adequately at her administrative hearing indicating no problems with anxiety attacks" (TR 90). He accepted the medical expert's evaluation of claimant and concluded:

> She admits that she is not seeing anything that is not there and has no delusions. She believes that there was a period of time when an individual at the Phillips Company was interested in her and it was nothing that she imagined. She does not believe that she suffers from delusions or hallucinations. She had not been hospitalized since December 1991 and medication appears to attenuate her symptoms. Further, she no longer has such side effects. She has no problems sleeping as long as she takes her medications. She is able to take long walks in the park most afternoons. She is able to fix meals and these are not activities that are commensurate with a totally disabling mental impairment. Dr. Goodman reported that the claimant has been improving. The claimant, herself, admitted that she has been improving over time. She said there was period of time when she thought the end of the world had come, but she no longer thinks so. She is no longer so paranoid. In short, the claimant has recovered from her worst symptoms. Dr. Goodman believes that if the claimant, at any time, met a Listing, it would only be for a short period of time back in 1991 when she was hospitalized.

There is no merit to claimant's contention that the ALJ erred in ignoring the assessments of Drs. Wellshear and Fotiu. While it is true that the ALJ did not give substantial weight to the statements of these physicians, as required by Turner v. Heckler, 754 F.2d 326, 329 (10th Cir. 1985), this was not significant error, as the physician's opinions were conclusory and unsupported by medical evidence and therefore might be

rejected, according to Allison v. Heckler, 711 F.2d 145, 148 (10th Cir. 1983). The ALJ noted that the medical expert questioned Dr. Wellshear's diagnoses (TR 86) and Dr. Fotiu's conclusions (TR 87) and the way they conducted their evaluations (TR 86-87). The ALJ concluded that "the medical record is essentially as Dr. Goodman reported." (TR 88). The decision to disregard the assessments of Wellshear and Fotiu was proper in this case. "It is an accepted principle that the opinion of a treating physician is not binding if it is contradicted by substantial evidence." Mongeur v. Heckler, 722 F.2d 1033, 1039 (2nd Cir. 1983).

There is also no merit to claimant's second claim that the ALJ's hypothetical questions to the vocational expert were inadequate. The questioning was as follows:

> Q Okay. Let's go to a hypothetical question. The same individual who was 47 years of age, has completed high school plus two years of college in marketing, has the past work history you just described. I further find this person can still perform, say, medium, light or sedentary work with additional restrictions. The primary ones are mental. We'll use Dr. Goodman's --
>
> MA: Do you need me anymore?
>
> ALJ: No, thank you very much.
>
> BY ADMINISTRATIVE LAW JUDGE:
>
> Q These are taken from Exhibit 39. Claimant is able to follow work rules, relate to co-workers, deal with the public good; and only fairly can use judgment with the public. interact with supervisors and deal with work stresses and is poor or none in attention and concentration category. Can perform, understanding [sic], remember and carry out simple job instructions good; only fair at detailed jobs and poor or none at complex jobs. Can only fairly maintain behavior in an emotional stable manner and relate predictably in social situations and demonstrated reliability good, retain personal appearance very good. Those are the final restrictions, with those restrictions would there be jobs in the regional and national economy such a person could perform?

A Okay. In the sedentary exertional range there'd be sedentary appointment clerk, there's 104,000 appointment clerks in the national economy, 13,000 in this region of Texas, Arkansas, Oklahoma and Louisiana. In the light exertional range there'd be light file clerk, there's 299,000 of those in the national economy and 37,000 in this region. Medium exertional range, medium janitorial work, that's unskilled, there's 900,000 of those jobs in the national economy and 100,000 in this region.

Q You said janitor is unskilled, what are the other skill levels?

A Semi-skilled.

Q Let's take another hypothetical and assume that the, all the testimony of the claimant is valid and accurate, would there be any jobs in the regional or national economy if that was true?

A No, I don't believe so.

Q. Why not?

A. Because of the difficulty dealing with work stresses and interaction with people, dealing with co-workers in an emotionally stable manner (TR 148-150). (emphasis added).

It is true that "testimony elicited by hypothetical questions that do not relate with precision all of a claimant's impairments cannot constitute substantial evidence to support the Secretary's decision." Hargis v. Sullivan, 945 F.2d 1482, 1492 (10th Cir. 1991) (quoting Ekeland v. Bowen, 899 F.2d 719, 722 (8th Cir. 1990)). However, in forming a hypothetical to a vocational expert, the ALJ need only include impairments if the record contains substantial evidence to support their inclusion. Talley v. Sullivan, 908 F.2d 585, 588 (10th Cir. 1990).

Initially the ALJ established that the vocational expert had been present for all of the testimony and reviewed the record (TR 148). His hypothetical questions contained all the impairments supported by Dr. Goodman, including "poor or none in attention and

concentration category" (TR 149). It was proper for the ALJ to limit the hypothetical questions to those impairments which were actually supported in the record.

The decision of the ALJ is supported by substantial evidence and is a pertinent application of the Social Security regulations. The decision is affirmed.

Dated this 20th day of March, 1995.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S:McSwain

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STANDARD MATERIALS CORPORATION, an Oklahoma Corporation Plaintiff, v. TAMKO ROOFING PRODUCTS, INC., f/k/a Tamko Asphalt Products, Inc., a Missouri Corporation Defendant.	)	Case No. 94-C-239-W

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW the Parties hereto, through their respective counsel, and pursuant to Rule 41 of the Federal Rules of Civil Procedure, and hereby stipulate and agree that each side's claims against the other be dismissed, with prejudice, each party to pay their own costs, because they have reached a settlement of the matter. The parties further stipulate and acknowledge that the judgment confessed by plaintiff Standard Materials Corporation regarding defendant TAMKO Roofing Products, Inc.'s counterclaim on December 29, 1994 is satisfied.

DATED this 9th day of ~~February~~ March, 1995.

Respectfully submitted,

LIPE, GREEN, PASCHAL,
TRUMP & BRAGG, P.C.

By: James E. Green Jr.

James E. Green, Jr., OBA #3582
Constance L. Young, OBA #14537
3700 First National Tower
15 East 5th Street, Suite 3700
Tulsa, OK 74103-4344

- and -

SHOOK, HARDY & BACON, P.C.

By: John C. Monica (by James E. Gray Jr. w/ Authorization)
John C. Monica, Esq.
One Kansas City Place
1200 Main Street
Kansas City, MO 64105-2118

ATTORNEYS FOR DEFENDANT

- AND -

N. KAY BRIDGER-RILEY, P.C.

By: N. Kay Bridger-Riley By JDY
N. Kay Bridger-Riley, OBA #1121
8908 South Yale Ave., Suite 230
Tulsa, OK 74137

- and -

SPRADLEY & REISMEYER

By: J. Dale Youngs
J. Dale Youngs, Esq.
1900 Boatmen's Center
920 Main Street
Kansas City, MO 64105

ATTORNEYS FOR PLAINTIFF

CLY\TAMKO\PLEADING\STIP.DIS